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TRANSCRIPT OF RECORD

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 15

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

UNITED STATES GYPSUM COMPANY, NATIONAL GYPSUM COMPANY, CERTAIN-TEED PRODUCTS CORPORATION, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA.

FILED NOVEMBER 26, 1946.

VOLUME 3

Pages 2451-3700



AFTERNOON SESSION

3710 (The trial was resumed at 2:00 o'clock p. m., pursuant to recess.)

Justice Stephens: Proceed, gentlemen.

Mr. Knuff: George N. Lenci!

Thereupon, GEORGE N. LENCI called as a witness herein by the United States, having been first duly sworn, testified as follows:

Mr. Knuff: May it please the Court, do Your Honors have before you the exhibits that Mr. Lenci will identify? The first one is a letter of the Universal Gypsum & Lime Co., dated May 9, 1927.

Justice Stephens: Yes, we have them.

Direct Examination

By Mr. Knuff:

Q. Your name, sir, is George N. Lenci, and you spell your last name L-e-n-c-i; is that correct? A. That is correct.

Q. Where do you live, Mr. Lenci? A. In Summit, New Jersey.

Q. My understanding is that you are Vice President of the Ebsary Gypsum Company; is that correct? A. Yes, sir.

Q. And you have been connected with the Ebsary
3711 Gypsum Company for how many years? A. Since 1911.

Mr. Knuff: If Your Honors please, we are now calling Mr. Lenci as if on cross-examination, under Rule 43(b).

Justice Stephens: Very well.

By Mr. Knuff:

Q. When was the Ebsary Gypsum Company organized? A. 1911.

Q. In what state? A. New York State.

Q. And who are the officers of the Ebsary Gypsum Company? A. Mr. F. G. Ebsary is President; I am Vice President; we have two other Vice Presidents, C. M. Winslow, who is Vice President in charge of Operations, and Frederick Hermansen, who is in charge of Transportation and warehousing.

Q. Mr. C. E. Hough is connected with the company, is he not? A. He is Treasurer.

Q. Who is the Secretary? A. The Secretary is Frank W. Allen.

Q. The Ebsary Gypsum Company manufactures and sells gypsum products consisting of plaster, both neat and sanded, is that correct? A. That is correct.

3712 Q. And gypsum board? A. Yes.

Q. And lath? A. Yes.

Q. Perforated lath? A. Yes.

Q. Metallized lath? A. Yes.

Q. Gypsum block? A. Yes.

Q. What other gypsum products? A. I think you have covered them all.

Q. The Ebsary Gypsum Company has a mine and a board plant at Wheatland, New York, is that correct? A. That is correct.

Q. And Wheatland is on the B & O Railroad, formerly the Buffalo, Rochester & Pittsburgh, is that correct? A. That is correct.

Q. You also have a sanding plant at Newark, New Jersey, is that correct, a mixing plant, rather? A. Yes, a mixing plant.

Q. The mixing plant that you have in Newark, New Jersey, and the plant at Wheatland, New York, are they the only two plants that the Ebsary Gypsum Company has? A. They are, yes.

3713 Q. Into what states do you ship your products, Mr. Lenci? A. Well, we ship into all of the Northeastern part of the United States.

Q. The so-called New England States? A. Well, including the New England States and down as far South as the Carolinas, and West to Ohio, Indiana and occasionally into Illinois. Generally speaking, it is in just the Eastern part of the country.

Q. When did Ebsary begin the manufacture of board? A. In 1928.

Q. And at that time, Ebsary manufactured what is known as an open-edge board, is that correct? A. Yes.

Mr. Knuff: What is our next exhibit number?

Mrs. Gillette: No. 401.

By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked for identification as Government's Exhibit No. 401, the same being a letter dated May 9, 1927, addressed to Ebsary Gypsum Company and signed Universal Gypsum & Lime Company, W. G. Stromquist, Eastern Sales Manager. That letter was received by the Ebsary Gypsum Company, was it not? A. Yes, sir.

Q. Now at the time you received—

3714 Justice Stephens: (Interposing) Let the Court read it, please.

Mr. Knuff: I beg your pardon.

(The document referred to was marked as Government's Exhibit No. 401 for Identification.)

Justice Stephens: Proceed.

By Mr. Knuff:

Q. At the time you received this letter, you were not manufacturing any kind of board, is that correct, either open or closed-edge board? A. That is right, yes.

Q. You say you did start to manufacture the open-edge board in 1928? A. Yes.

Q. You did purchase open-edge board from Universal Gypsum & Lime Company, did you not? A. Open-edge board?

Q. Open-edge board. A. I don't think this was an open-edge board.

Q. You purchased closed-edge board from them? A. I believe so, yes.

Q. And the board that is referred to in the letter of May 9 is a closed-edge board? A. I believe it is.

3715 Q. You will notice that in the second paragraph of this letter, it states:

"It is understood—"

Mr. Bromley: Just a moment. I object to any examination on the letter prior to the time it is received in evidence, if it is received.

Mr. Knuff: We now offer in evidence, if Your Honors please, Government's Exhibit No. 401.

Mr. Bromley: I object to it on the ground of no proper foundation, and therefore incompetent; and also immaterial because it has no relevancy to any charge in the complaint, for the following reasons: First, it is dated prior to the time that any conspiracy is charged in the pleadings; secondly, there is no charge that Ebsary is a manufacturing distributor; and, of course, at this time Ebsary was not a licensee, although Universal was. So I don't see what relevancy it has to any charge in the complaint.

Justice Stephens: What have you to say, Mr. Knuff, first as to identification?

Mr. Knuff: That it was received by Ebsary Gypsum Company, as Mr. Lenci has testified.

Justice Stephens: Well, the statement that a piece of

paper has been received doesn't necessarily identify it. He hasn't testified who he received it from, or whether it was sent by this company to his knowledge, or as to the
3716 signature of Stromquist.

Mr. Knuff: I didn't hear the last.

Justice Stephens: He has only stated that he received this piece of paper, as I understand his testimony. I didn't understand that you asked him to identify the signature or to state who he received it from.

By Mr. Knuff:

Q. Mr. Stromquist was at one time employed by your company, was he not? A. He was, for a short time.

Q. When? A. In 1930.

Q. That is after the date of this letter? A. Yes.

Q. In what capacity was he employed? A. Sales Manager.

Q. And for how long was he so employed? A. I think about 6 or 8 months.

Q. And you believe that this is the signature of W. G. Stromquist, do you not?

Mr. Bromley: I object to what he believes as incompetent.

Justice Stephens: Objection sustained.

Are you familiar with Mr. Stromquist's signature, Mr. Lenci?

3717 The Witness: Your Honor, I haven't seen Mr. Stromquist's signature in probably 12 or 14 years.

Justice Stephens: The signature can't be proved by belief, Mr. Knuff. You can ask this witness whether or not he has seen signatures of Mr. Stromquist, is familiar with his writing, and ask him whether or not he is able to testify whether this is his signature. That is the orthodox way, if there is objection on the ground of identification.

By Mr. Knuff:

Q. You have testified that Mr. Stromquist was employed by the Ebsary Gypsum Company, have you not? A. Yes.

Q. And you are familiar with his signature, are you not? A. I was at that time.

Q. And this letter, the letter that has been marked as Government's Exhibit 401, came from the files of the Ebsary Gypsum Company, did it not? A. It did.

Q. And you furnished it to us under subpoena? A. Yes.

Q. And it came into the Ebsary Gypsum Company in the usual course of business, did it not? A. I believe it did.

Q. And you acted upon the contents of this letter,
3718 did you not? A. I don't quite understand.

Q. Did you buy board from the Universal Gypsum & Lime Company as suggested in this letter?

Mr. Bromley: I object to that as calling for a conclusion —"as suggested in this letter"—and therefore as incompetent.

Justice Stephens: Objection sustained.

Mr. Knuff: If Your Honor please—

Justice Stephens: (Interposing) I don't quite see why, Mr. Knuff, the Government doesn't go at this thing in the orthodox way. Why do we need to take so much time on all these debates between counsel on the matter of identifying signatures? Can't you call Stromquist?

Mr. Knuff: I don't know where he is.

Justice Stephens: Can't you call somebody who knows his signature?

Mr. Knuff: We were under the impression that Mr. Lenci knew his signature, because he worked for the Ebsary Company for 6 or 8 months. Here we have a letter that came out of his files.

Justice Stephens: Haven't you had an opportunity to examine this witness, before you put him on, as to whether he could identify this signature?

Mr. Knuff: Yes, and Mr. Lenci told me last night
3719 that it was his signature.

At least, Mr. Lenci, that is the way I understood you, that you felt this was his signature.

The Witness: May I repeat what I said?

By Mr. Knuff:

Q. Certainly. A. I said, "I believe it is his signature," but I would not say for sure that it was, because I was not absolutely certain. That I would have to say anyway.

Justice Stephens: Mr. Varian, is there any dispute about this?

Mr. Varian: I had never known anything about Mr. Stromquist but it was a letter that was in the files of the Ebsary Gypsum Company.

Justice Stephens: It seems too bad to take up so much time, in this long and complicated case, in debating about things that ought to be stipulated to, if they can be. There probably is no doubt about the authenticity of this letter, and yet if objection is made the Court is bound to apply the rules of evidence.

This witness testifies to nothing but a belief or an opinion as to whose signature this is.

Mr. Knuff: If Your Honor pleases, may I go further?

Justice Stephens: Yes.

By Mr. Knuff:

3720 Q. Did you buy board from the Universal Gypsum & Lime Company, sometime after May 9, 1927? A. My recollection is that we bought a small quantity of board from the Universal Gypsum & Lime Company shortly prior to the time we went into production ourselves.

Q. And you went into production when? A. In 1928.

Q. In what part of 1928? A. I don't recall, but I think it was either the spring or very early summer.

Q. Is there any doubt in your mind that this is Mr. Stromquist's letter and Mr. Stromquist's signature, Mr. Lenci?

Mr. Bromley: I object to that as repetitious.

Justice Stephens: Let me hear the question.

(The question was read by the reporter.)

Justice Stephens: He has just said that there is.

Mr. Knuff: He said he believed that it was Mr. Stromquist's signature.

Justice Stephens: Let me examine the witness a minute. Perhaps it will save a little time, perhaps not.

How long was Stromquist with you?

The Witness: I think about 6 or 8 months, Your Honor.

Justice Stephens: Did you have a day-to-day association with him?

3721 The Witness: Yes, more or less.

Justice Stephens: Did you exchange memoranda with him?

The Witness: No, because, being in the same offices, there wasn't very much occasion for that.

Justice Stephens: Did you see any of the letters or memoranda that he wrote?

The Witness: Yes.

Justice Stephens: Did you ever see his signature?

The Witness: Yes.

Justice Stephens: Well, are you able to state whether or not this is his signature? Just answer that yes or no.

The Witness: I couldn't without a qualification.

Justice Stephens: What causes you to doubt it?

The Witness: Because there are other letters in this group of exhibits which also are signed W. G. Stromquist, which are not written the same as this, and I am not sure which is which.

Justice Stephens: You think possibly it might have been written by his secretary for him?

The Witness: I think possibly it might have, yes.

Justice Stephens: It seems to the Court, Mr. Knuff, that the witness is being properly careful.

Mr. Knuff: Well, here is the position that the Government takes, Your Honor. We filed and served upon the Ebsary Gypsum Company a subpoena calling upon
3722 the Ebsary Gypsum Company to produce certain documents. The Ebsary Gypsum Company, before they could produce certain documents, had to undertake to determine what documents were called for in that subpoena. They undertook to and they did determine what documents were called for. They came in with the documents, and among the documents that they came in with was Government's Exhibit 401.

In effect, Ebsary Gypsum Company said to us, "You have served us with this subpoena. We now comply with this subpoena. We give you this document. We think that this document answers the description in the subpoena. We have taken it from our files; we have kept it in our files from 1927 to 1940; we regarded it as a paper of some importance or we wouldn't have kept it in our files. We are therefore complying with your subpoena and we are giving you the paper that you asked for."

It seems to me, in view of those facts, that this is a proper identification. They certainly wouldn't have kept something in their files that they didn't believe was an authentic document; and by their keeping it in their files and by their handing it over to us, they expressed their belief that the document was authentic.

Justice Stephens: It seems to the Court, Mr. Knuff, at least to two members of the Court, Judge Garrett and myself—I think Judge Jackson has a doubt on the sub-
3723 ject; and in fairness to him I must state that—that you are arguing two different things. You are arguing that the possession of this document might be some evidence that the company regarded it as having some value. But we don't think that you have shown it to be a letter of the Universal Gypsum & Lime Company. It probably is, but you haven't proved it, and under objection we have got to rule according to the rules of evidence. This witness very carefully and painstakingly says that he can not identify this signature because it differs from other signatures of Stromquist, and he thinks it might have been written by some secretary.

Mr. Knuff: It was received in the regular course of business and acted upon, Your Honor.

Justice Stephens: That is a mere assumption on counsel's part, that it was received in the regular course of business. That assumes that it was started out from the Universal Gypsum & Lime Company's offices. I don't want to debate upon it any more. The objection is sustained.

By Mr. Knuff:

Q. I notice, Mr. Lenci, in the upper left-hand corner of this document there appears "Copy sent to"—and then what is that word? A. It says, "Copy sent to C. M. Winslow".

Q. And in whose handwriting is that? A. That is
3724 the handwriting of one of the girls in that office.

Q. Do you recognize that handwriting? A. I recognize her writing, yes.

Justice Stephens: Is that on the photostat?

Mr. Knuff: Yes, Your Honor, up in the upper left-hand corner.

By Mr. Knuff:

Q. And that would indicate, sir, that this letter did come into your office? A. Yes, certainly.

Justice Stephens: There is no dispute about that. You needn't take any more time up on that. He has already testified it came to his office, but you haven't shown where it came from.

Mr. Knuff: Well, if Your Honor pleases, I don't want to labour the point, but here you have the stationery of the Universal Gypsum & Lime Company. You have a letter on that stationery; and it came, as I interpret the witness' testimony, in the usual course of business; and the girl in the office puts a notation on it, "Copy sent to C. M. Winslow"; and Mr. Lenci did testify that they did buy some lath, or some board, or whatever the subject matter of this letter was, from the Universal Gypsum & Lime Company sometime prior to their going into production in 1928.

Now here you have got a letter coming in—if it
3725 isn't a letter of the Universal Gypsum & Lime Company, it seems to me that the Universal Gypsum & Lime Company can come into court and say that it isn't—but at least we have established a prima facie case that a letter, in the usual course of business, coming into a business house, was received in that business house. It prima facie comes from the person whose name appears on it.

Justice Stephens: I am sorry, Mr. Knuff, but it seems to me and Judge Garrett that you are arguing contrary to the most elementary rules of evidence with respect to the identification of documents. The objection is sustained.

By Mr. Knuff:

Q. You stated, Mr. Lenci, that you did buy some board from Universal Gypsum & Lime Company a short time prior to the time when the Ebsary Gypsum Company got into production at their plants? A. Yes, sir.

Q. How much did you pay for that board? A. I don't remember, now.

Q. Well, will you look at the letter and see if that letter refreshes your recollection?

Justice Garrett: What letter? This letter that has not been identified?

Mr. Knuff: Yes, Your Honor.

Mr. Bromley: If the Court pleases, I object to his
3726 using this exhibit, 401 for Identification, for the purpose of refreshing his recollection.

Justice Stephens: Well, I don't see the force of that, Mr. Bromley. Anything that refreshes recollection, if it does, can be used, whether a stick or a stone or a loose piece of paper. One's memory may be refreshed by an event or a letter or a postscript or a scrap of paper, if it is so refreshed. Of course, he can't read from that.

That objection is overruled.

You are not supposed to read from this letter, because it hasn't been identified yet, but if it does refresh your recollection so that you can testify from your own memory, state first whether or not it does—does it?

The Witness: It does in a general way, Your Honor, yes. I think I can answer the question and save a little time.

By Mr. Knuff:

Q. Since your memory has been refreshed, do you recall how much you paid per thousand square feet for that board? A. My best recollection is that we paid the $30 price, less a commission which amounted to about 10 percent. That is my recollection.

Q. That would be 10 percent on $30, is that correct?

A. Approximately that. As I remember it, we had
3727 about a 10 percent margin on that board.

Q. And that would indicate that you paid $27 for the board, is that correct? A. Yes.

Q. Now had you any conversations or any correspondence with Mr. Stromquist as to how you should sell this board? A. I don't remember anything about that, sir, it is so long ago I don't remember. I read the letter, but that doesn't refresh—

Q. (Interposing) Does the letter refresh your recollection? A. It honestly doesn't refresh my memory. There was very little of it, you see what I mean, very little of that board bought.

Mr. Knuff: So that we will not lose any time, I now here make a motion for permission to subpoena W. G. Stromquist. I don't know where he is, but I assume that he lives more than 100 miles beyond the jurisdiction of the District of Columbia. May we have that permission, and I will make every endeavor to get Mr. Stromquist here.

Justice Stephens: Do you know where he is?

The Witness: The last I heard, I understood he was in Chicago. I think he was with the Masonite Company, although I am not certain.

Justice Stephens: You think there is no possibility,
3728 Mr. Varian, in the proper protection of your client, of stipulating to this?

Mr. Varian: What was that, Your Honor?

Justice Stephens: You think there is no possibility of your stipulating to this? I don't require you to do so, of course. You must use your own judgment. But it seems too bad to bring a witness, in these days of difficult transportation, from as far as Chicago if there is any possibility of stipulating to the identity of this signature or to this letter having been sent to you by Universal Gypsum & Lime Company. The practical probabilities are, of course, that it was.

Mr. Varian: I haven't any doubt, finding that letter in the Ebsary papers, that it was a letter that was received by the company from Mr. Stromquist. But I can not speak for the other defendants who are interested in this.

Justice Stephens: I understand that.

Mr. Varian: I have no objections to conceding, for the purposes of the Ebsary Gypsum Company, that that is Mr. Stromquist's signature and that he was an employee or officer of Universal.

Justice Stephens: I want you to be quite clear that the Court is not requiring you to do that at all. You must do it thoroughly of your own accord. I am just trying to save time.

3729 Mr. Varian: Yes. Well, I am very anxious to save time.

Justice Stephens: If that stipulation is made, that is as high a level of identification as the identification of the witness, if he knew the signature. That being true, we reach the question of materiality.

Mr. Knuff, what do you say as to the objection of Mr. Bromley that this is not material or relevant, there being no charge that this company was a manufacturing distributor and there being no license at this time? What is the relevancy and materiality of the letter?

Mr. Knuff: If Your Honor will turn to paragraph 47 of the complaint, you will note we say there that "The combination was formed during the period between the month of September 1925 and early in the year 1930."

Now here is the situation as applies to the materiality. Beaver took out a license with USG on July 29, 1926. Universal took out a license with USG on September 17, 1926. Atlantic took out their license on March 5, 1927. Texas took out their license on April 18, 1927. And, of course, at this time USG was the licensor.

Now here you have five companies that were operating under a license agreement. Four of them were licensees, and one was the licensor. Under this license agreement it was provided that USG had the right to fix the price of gypsum board.

3730 Here we have one of the companies who was a licensee of USG selling board to another company, and at the same time they told this other company, "You will respect our price policy, you will sell this board at a certain price, you will base your freight not from Wheatland but from our plant at Oakfield, you will use the weight of 1850 pounds.

We think that is evidence of the conspiracy that has already been formed, going back at least to 1925 and probably back beyond that.

Here you have the Universal telling another company, which later became a licensee of USG, "Yes, we will sell you board, but we want you to respect our price."

We think it is very material, Your Honor, and very relevant.

Justice Stephens: What do you say to that, Mr. Bromley?

Mr. Bromley: In paragraph 47, to which he has called the Court's attention, the statement merely is that the combination was formed during the period between September 1925 and early in the year 1930. Now that could be any time between 1925 and 1930.

If you will turn over to paragraph 121, you will see that the second sentence says: "Since the year 1929, all gypsum board sold by all manufacturers and all manufacturing distributors in the Eastern area has been sold at

uniform and non-competitive prices dictated by U. S.
3731 G., with a resultant elimination of all price competition in the distribution of gypsum board from manufacturers to dealers."

Then in paragraph 122, the first sentence reads: "Said uniform and non-competitive prices have been, throughout the period of the operation of the combination, substantially higher than those prices prevailing at the time of the formation of said combination in the year 1929."

Now that, to me, makes the generality of the allegation in paragraph 47 specific, and shows clearly that they don't contend that there was any combination prior to 1929, or that there was any price uniformity prior to 1929.

Mr. Knuff: Of course, we can't let that statement of Mr. Bromley go unchallenged, that we don't contend that there was any conspiracy before 1929. We do contend that there was a conspiracy in existence before 1929.

Justice Stephens: Well, where in the complaint do you charge it?

Mr. Knuff: In paragraph 47 we say that, Your Honor.

Justice Stephens: Yes, but that is in conflict with the statements in paragraphs 121 and 122, that it was formed in 1929.

Mr. Knuff: The completed combination covering all board probably occurred in 1929, but it didn't have its genesis in 1929.

Mr. Bromley: I would like to raise the further
3732 point that—

Justice Stephens: (Interposing) Just a moment, Mr. Bromley.

(The Justices conferred among themselves.)

Justice Stephens: All right, we will hear you further now, Mr. Bromley, but while you are speaking, please speak on this subject: There is some doubt in the minds of the Judges, under the very broad construction of the complaint taken by the majority of the Court, as to whether this is admissible, in view of the allegations of paragraphs 121 and 122; but there is another point of view, it seems to me, which can be urged, and which I assume is what Mr. Knuff is really contending, and that is this: It is true the complaint alleges that the combination was formed in 1929—paragraphs 121 and 122—but the defendants deny there was any combination at all, and the Government doesn't contend that the combination came into existence as the result of

one act or one conference or one agreement, it claims that it developed gradually out of roots reaching back into relationships and litigations and associations and trade transactions, over quite a long period of time. The complaint alleges a good many of those items. Isn't the Government entitled to try to prove the combination by proving that circumstances antedating 1929 are of such a character as lend an inference to the existence of a combination by
3733 1929?

Is that what you contend, Mr. Knuff?

Mr. Knuff: Yes, Your Honor, and I have particular reference to page 24 and page 25 of our trial brief. While I didn't call Your Honors' attention to those specific pages, those are the cases that I had reference to, the American Equipment Company v. Tuthill Building Material Company, and those cases.

3734 Justice Stephens: Well, this isn't so much a question of cases; it is a question of the nature of the conspiracy.

What do you say, Mr. Bromley, as to the point just made by myself?

Mr. Bromley: Well, I should be willing to accept that as a general statement. But here this proffered testimony hasn't any materiality even as a root, because it can best be illustrated, it seems to me, by the ruling of the majority the other day when you permitted, although not specifically alleged, the Government to prove that one licensee sold board to another, and that that board was resold by the purchasing licensee at a certain price.

Now here Ebsary was not a licensee. So that that, at the outset, distinguishes this situation from that. Ebsary was only a plaster manufacturer. Ebsary, if it was anything, in 1927, was a manufacturing distributor because it was neither a licensee nor a manufacturer of board; it made only plaster.

Now the paragraph that has to do with manufacturing distributors, Paragraph 108, on page 28 of the complaint, says:

"Throughout the period from the year 1929 to the date of filing this complaint, U.S.G. and its licensees have, by concerted action, induced and coerced manufacturing distributors purchasing gypsum board from U.S.G. and its licensees to resell said gypsum board to dealers and consumers at the bulletin prices determined and fixed by U.S.G. for
3735 sales of board by its licensees to dealers and consumers, as described in paragraph 91 hereof."

We asked them who they were talking about and they gave us a list of names, and the Ebsary Gypsum Company does not appear on that list. So I don't see how it is possible to apply the general rule, the soundness of which I think is clear, to this situation where they now want to show some background, true, but the background hasn't anything to do with any manufacturing distributor whom they allege was subject to the control of these defendants in his resale policies.

And it is because Ebsary—if it was written and received—at the time it got the letter was neither a licensee nor a manufacturer of board, but was merely a plaster manufacturer, and therefore by definition was a manufacturing distributor, and there is no charge to which this could be relevant. That is why it seems to me that the thing is clearly immaterial and not covered by the Court's ruling of the other day, even in principle.

Mr. Knuff: We don't contend—and this is one of the few times that you will hear me say that we admit something—we don't contend that the Ebsary Gypsum Company was a manufacturing distributor. What we say the Ebsary Gypsum Company was, is that it was a manufacturer. Here you have four companies who had entered into this license agreement with U.S.G., and under the license agree-
3736 ment, U.S.G. was fixing the prices. One of those four companies was fixing the price of board on the resale.

Now here we have a continuing conspiracy, and we contend that what one of these companies did during this period is certainly relevant and competent testimony to explain, and to high-light, just exactly the extent and the scope of this conspiracy.

Justice Stephens: Did Universal have a license at the time this letter was written?

Mr. Knuff: Yes, Your Honor.

Mr. Bromley: Ebsary did not.

Mr. Knuff: There were four licensees at this time—Beaver, Universal, Atlantic and Texas. Under Mr. Bromley's argument, if the Ebsary Gypsum Company was a manufacturing distributor then this is certainly evidence that they were controlling the prices to manufacturing distributors—on his own argument.

Justice Stephens: But you don't charge that.

Mr. Knuff: We don't charge that, but even on his own argument it would be evidence of that.

Justice Stephens: Well, if you don't charge it, why are you entitled to prove it?

Mr. Knuff: We don't say that they are, and we don't think they were.

Justice Stephens: And you excluded them from
3737 your bill of particulars by not naming them.

Mr. Knuff: And we still say they aren't.

Justice Stephens: Still you say you can prove they were.

Mr. Knuff: I say it would be evidence, merely on Mr. Bromley's own statement.

Justice Stephens: Is there a substantial amount of evidence of this type to come in?

Mr. Knuff: Yes, I would say that there is quite a bit of it, your Honor.

Justice Stephens: We will take a recess for five minutes.

(Whereupon, a five minute recess was taken, after which the hearing was resumed.)

3738 Justice Stephens: Mr. Knuff, what resale price fixing do you charge in the complaint? You charge resale price fixing in respect of manufacturing distributors and on metallized board—anything else?

Mr. Knuff: Well, under the broad conspiracy charge we say that there was a resale price fixing for all board. I think that came within the ruling of your Honors in the broad construction of the complaint the other day, and I think that under that ruling we would be allowed to show it.

We say in paragraph 121—

Justice Stephens: (Interposing) Isn't it a little misleading—I don't mean intentionally of course—to speak of that class of transactions with which we dealt in the reserved rulings in which the Court by a majority ruled that the complaint was broad enough to charge the fixing of prices upon purchased board, as distinguished from board manufactured under the licenses, isn't it a little confusing to describe that as a resale price fixing, and put it in the same category as the metalized board and the manufacturing distributors' resale price fixing alleged?

Mr. Knuff: Well, I don't attribute any magical significance to that, and I don't think the Court means to infer that I do by the use of the word "resale". I say that if you have price fixing, you have price fixing, it can be resale price fixing, original price fixing, or what not. Here is the situation in this case, and I think it is important that the
3739 Court get it.

Beaver was a licensee at the time, at the date of this letter; Atlantic was a licensee; Texas was a licensee and Universal was a licensee.

United States Gypsum Company was the licensor.

You have five companies there, all having the same price policy. That is, USG was fixing the price for five companies, themselves and four other companies. Here you have one of the companies whose prices were fixed, fixing the prices for Mr. Ebsary's company, the Ebsary Gypsum Company.

I think that that is evidence that there was a conspiracy to fix prices. It is a declaration of one of the co-conspirators in furtherance of the conspiracy. This co-conspirator says, "Yes, I will sell you board, but if I do sell you board, you must observe my price policy", and on that basis, the board was sold.

This is not just an independent, isolated transaction, it is a transaction by one of the original four licensees, and as I say—and I cannot emphasize it too strongly—at this time you had five companies who had an identical price policy, and you have one of those five companies imposing that price policy on the Ebsary Gypsum Company.

Mr. Bromley: Now let's test the soundness of that. Where would my friend draw the line? Suppose, instead of being what it is, this letter was a letter from Uni-
3740 versal, a licensee, to a dealer, in which Universal said, "Now I am going to sell you my material, but, Mr. Dealer, you observe the prices I tell you."

Would my friend say that that, under any construction of the pleadings, would be material? There isn't any charge here that dealers' resale prices were fixed, and yet a dealer's price is a resale price, is a resale transaction, in the same sense that this is. We have got to stop somewhere. We couldn't, it seems to me, possibly permit testimony that this conspiracy, as alleged in these pleadings, was broad enough to include the 20,000 dealers.

Now they have said what it was, and it seems to me that that is an attempt to go as far beyond it as it would be if they came in with a sudden claim that the conspiracy encompassed the fixing of dealers' prices, or contractors' prices. It hasn't any relevancy to what they say was the unlawful combination.

I am not certain now but what my friend would take the position that he would think it competent and material to try to prove a fixing of dealers' resale prices. I would like to hear him say whether he would or not.

Mr. Knuff: No.

Mr. Bromley: Well, I think that that tests it, then. Of course you have got to draw a line somewhere. You have got to draw it, as they drew it in the pleadings, and
3741 in the Bill of Particulars.

Justice Stephens: Well, we have discussed the matter thoroughly and heard counsel, and we are agreed that the objections are well taken.

We think that this evidence could be relevant only, that is this item of evidence, Exhibit 401 for identification, it could be relevant and material only to prove resale price fixing by manufacturing distributors only, or by some person in some such position.

The complaint limited that charge, as explained by the Bill of Particulars, to certain companies, and this company was not one of them.

The Court does not, by this ruling, restrict the Government from proving the genesis of the conspiracy, and the dealings between the licensees, and the litigations and transactions and tradings alleged, but we think the objections to this particular exhibit are well taken.

Sustained.

Mr. Knuff: If I understand your ruling, your Honor, and assuming the correctness of it, we feel that this evidence, although it only goes to the question of fixing the resale price of manufacturing distributors, is likewise competent because, although we do not charge the defendant, Ebsary Gypsum Company, with being a manufacturing distributor, yet Mr. Bromley says that apparently that is what
3742 Ebsary Gypsum Company was, a manufacturing distributor.

Assuming that that is correct, you have here then a situation where—

Justice Stephens: (Interposing) You are rearguing this question, are you, Mr. Knuff?

Mr. Knuff: No, I want to see what my limitations are in so far as getting this letter in evidence. I wish your Honor would bear with me for just one moment.

Justice Stephens: The Court doesn't want to seem not willing to bear with you, Mr. Knuff, but sometimes the Court gets the impression that because it is sufficiently patient and sufficiently anxious to make all of its ruling very clear to counsel, and state the reasons why it acts as it does upon every class of evidence that doesn't just involve a routine ruling, that counsel get the impression that they are entitled to keep arguing these things after the rulings, and

that isn't a good way to make the trial move along. We have to come to an end of the argument at some time.

Mr. Knuff: I appreciate that, your Honor, but I want to make this one point, and then if I may, I won't say any more.

Justice Stephens: Thank you.

Mr. Knuff: After 1929 we charge in our complaint that the defendants fixed the price of the manufacturing distributors. Now taking Mr. Bromley at his own word,
3743 that the Ebsary Gypsum Company was a manufacturing distributor in 1927, what they did in 1927 would be some evidence of what they were doing in 1929, and on that basis, if for no other reason, we think this exhibit is competent.

Here you have the manufacturing distributors' price being fixed after 1929. Mr. Bromley says that in 1929 Ebsary was a manufacturing distributor. All right, we say that if their prices in 1927 were fixed as a manufacturing distributor, that that is evidence of what was done after 1929.

Justice Stephens: With other manufacturing distributors?

Mr. Knuff: With other manufacturing distributors.

Justice Stephens: Well, haven't you evidence to prove what was done in respect of other manufacturing distributors, without going into that with respect to this one?

Mr. Knuff: We have other evidence, but we certainly think that this is competent to prove that, on that theory.

Justice Stephens: What do you say to that, Mr. Bromley, if anything?

Mr. Bromley: In the first place, it must be remembered that after 1929 Ebsary was not a manufacturing distributor because it became a licensee. If, after 1929, Ebsary were a manufacturing distributor, there might be something to his argument, but the fact that away back in 1927, if it be the fact, there is some evidence that this company was controlled, is no evidence that after 1929 other companies
3744 were controlled. It hasn't any relevancy to it, and it hasn't because the status of this company changed in 1929, when it became a licensee.

Justice Stephens: His contention is something like the "other crimes" argument, as I get it, in a criminal case, that because Universal was willing to dictate the price to Ebsary as a manufacturing distributor in fact, though not so called in the complaint, in 1927, that that is some evidence that

Universal was committing that kind of act, that there is a common design and scheme running through this situation, so that evidence of this act is evidence of another one of the same quality.

Mr. Bromley: It seems to me to be too remote, and in view of the charges in the complaint, to have no relevancy to the charges contained in the complaint.

Justice Stephens: Well, thank you for your further argument, but I am sorry, we are still unconvinced on this particular item of evidence.

It is excluded.

By Mr. Knuff:

Q. Do you recall, Mr. Linci, at what price you sold the board that you purchased from Universal, and by the "board you purchased from Universal", I mean the board that you testified you purchased from them just a short time before your company got into manufacture.

Mr. Bromley: That is objected to as immaterial.

3745 Justice Stephens: What is the purpose of that?

Mr. Knuff: That hasn't anything to do with this exhibit, your Honor. The purpose of that is to—

Justice Stephens: (Interposing) I take it for granted that it hasn't—you are going to another line of testimony?

Mr. Knuff: Yes. The purpose of that is to show the resale price fixing by one of the original conspirators in this case.

Justice Stephens: The resale price fixing through Ebsary?

Mr. Knuff: That is right. Ebsary observed this price policy under an agreement, as we understand it, with Universal.

Justice Stephens: Well, that is the very same question over again, isn't it?

Mr. Knuff: I thought we were arguing on this letter, your Honor, the admissibility of Exhibit 401. I may be wrong on that.

Justice Stephens: I thought that had been ruled upon.

Mr. Knuff: That was ruled upon before. Now my question is not directed to the introduction of this exhibit, but my question is directed to the resale by Ebsary Gypsum Company of board purchased by them from Universal.

Justice Stephens: You mean under the general charge of purchases of board?

Mr. Knuff: That is right.

Justice Stephens: And selling board at prices
3746 fixed by a licensee?

Mr. Knuff: That is right.

Justice Stephens: In other words, you are going to the general ruling of the majority of the Court that there was a buying and selling of board between the various defendant licensees, and the selling of that board under the bulletin prices, even though it wasn't manufactured and sold by a particular one?

Mr. Knuff: Well; at the time I have reference to, your Honor—I want to be perfectly frank with your Honor—Ebsary Gypsum Company was not a licensee. My question is directed to a time preceding the time when Ebsary signed the license agreement.

Mr. Bromley: It is covered by the ruling just made. It is the same question all over again.

Justice Stephens: I think it is exactly the same question as was presented by the arguments on Exhibit 401. The objection is sustained.

By Mr. Knuff:

Q. Mr. Lenci, I show you what has been marked for identification as Government's Exhibit No. 402, the same being a copy of a letter dated May 29, 1927, addressed to the Ebsary Gypsum Company, Caledonia, New York, and signed W. G. Stromquist.

3747 (The document referred to was marked as Government's Exhibit No. 402, for identification.)

By Mr. Knuff:

Q. That is Mr. Stromquist's signature, is it not, Mr. Lenci? A. My answer to that would have to be exactly the same as to the other one.

Mr. Knuff: Mr. Varian, will you admit that Government's Exhibit No. 402 for identification is a copy of a letter that was received by Ebsary Gypsum Company from the Universal Gypsum & Lime Company?

Mr. Varian: I cannot stipulate that, because I do not understand that this came from Ebsary's files. You told me so last night.

Mr. Knuff: That is correct, it did not.

Mr. Varian: So I cannot stipulate anything about it, because I don't know anything about it.

Mr. Knuff: Mr. Finck, will you state that the letter marked for identification as Government's Exhibit 402,

was received by the Government from the National Gypsum Company?

Mr. Finck: I don't know whether it was or not.

Mr. Knuff: Didn't you furnish that to us under the subpoena?

Mr. Finck: I don't believe so. There is no indication on it as to our mark.

3748 By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked for identification as Government's Exhibit No. 403, the same being a photostat of a letter dated January 8, 1930, and signed W. G. Stromquist, Eastern Sales Manager.

(The document referred to was marked as Government's Exhibit No. 403, for identification.)

By Mr. Knuff:

Q. Are you able to identify that as Mr. Stromquist's signature, Mr. Lenci? A. No, sir.

Mr. Knuff: Mr. Finck—

Mr. Finck: (Interposing) I haven't seen the letter; I don't know anything about it.

Justice Stephens: Mr. Marshal, hand it to Mr. Finck.

(Thereupon, Government's Exhibit No. 403 for identification was handed to Mr. Finck.)

Mr. Knuff: Is it correct, Mr. Finck, that that letter, Government's Exhibit 403 for identification, was furnished to the Government by the National Gypsum Company from the files of the National Gypsum Company, and that the attached bulletin was likewise furnished by the National Gypsum Company at the same time?

Justice Stephens: Furnished by National?

3749 Mr. Knuff: Furnished by National, yes, your Honor.

Mr. Finck: It came from the files of the National Gypsum Company and was submitted subject to the subpoena.

Justice Stephens: You mean it was furnished to the Government?

Mr. Knuff: Yes, furnished to the Government from the National Gypsum Company, from the files of the National Gypsum Company, in response to a Government subpoena.

Justice Stephens: Do you concede, Mr. Finck, that the letter, Exhibit 403, with its accompanying bulletin, was received from Universal?

Mr. Finck: No, I do not. I cannot stipulate its authenticity, or that it came from Universal.

Justice Stephens: Proceed.

Mr. Knuff: May we have permission, if your Honor please, to subpoena W. G. Stromquist?

Justice Stephens: I am not sure, Mr. Knuff, offhand, whether that application for a subpoena has to be in writing or not. Of course if you need the witness, you are entitled to get him here, but your applications heretofore have been made in writing, and I have forgotten the rule for the moment.

Mr. Knuff: We made one application, not in writing, and that was for Mr. Redfield. However, we have no objection to making the application in writing.

Justice Stephens: I don't want to put you to
3750 that trouble unless it is necessary, of course. Let me look up the rule.

Mr. Knuff: I don't think you will find it in the rules, it will be under the Sherman Act.

Justice Stephens: There is a provision in the rules, I think, with respect to witnesses living beyond one hundred miles.

Mr. Knuff: Well, it is the Sherman Act provisions that govern, as I recall. The Sherman Act says that the permission of the Court must first be had to obtain the attendance of a witness who lives beyond the jurisdiction of the court a distance of more than one hundred miles. I believe that is Section 22 or 23 of the Sherman Act.

Justice Stephens: But there is a rule on the subject also.

(After examining Rules.)

It is a combination of the statute and the rule, I find. There seems to be no requirement for a written application when the application is made in open court, and the Court will order the clerk to issue the subpoena upon the showing thus far made by the Government of its need of the witness W. G. Stromquist. You may obtain the subpoena at your convenience.

Mr. Knuff: Thank you, your Honor.

By Mr. Knuff:

Q. Mr. Lenci, you attended a meeting at Chicago in May, 1929, at which other manufacturers of gypsum
3751 board were present, is that correct? A. That was the time of the license meeting, in 1929, yes.

Q. And the date of that meeting in Chicago was May 22 or May 23—I believe it was May 22 and May 23, is that correct? A. Well, I thought it was May 21 and May 22.

Q. Well, it was sometime in the latter part of May, 1929? A. That is right.

Q. Now before you went out to Chicago it is a fact, is it not, that you knew that such a meeting was going to be held? A. My recollection on that is not too clear. I do know that we were going out there in connection with a proposed license, board license.

Q. And you had gone to Chicago pursuant to a previous arrangement, had you not? A. There must have been something to bring that about, yes. I don't know the exact circumstances.

Q. And at the time you went there Mr. Fred Ebsary accompanied you? A. Yes.

Q. And Mr. Harlan Rippey accompanied you? A. Yes, Judge Rippey.

Q. When you got out to Chicago you did attend the meeting of the manufacturers at the Palmer House
3752 in Chicago, did you not? A. Yes.

Q. And there were present at that time, Sewall L. Avery, representing the United States Gypsum Company—is that not correct? A. Yes.

Q. And Charles F. Henning, representing USG, is that correct? A. Yes.

Q. And Mr. John MacLeish, representing USG? A. I believe so.

Q. And Niagara Gypsum Company was represented by M. A. Reeb, is that correct? A. Yes.

Q. And National Gypsum Company was represented by M. H. Baker, isn't that correct? A. Yes, sir.

Q. Do you know whether or not Mr. Ralph Burley, the vice president of National, was out there at that time? A. I don't remember.

Q. You do remember Mr. Baker being there? A. Yes.

Q. Do you remember whether Mr. Finck was there? A. I don't.

Q. Do you remember that Mr. C. O. Brown repre-
3753 sented Certain-teed at that meeting? A. I believe that Certain-teed was represented, but I do not remember who was their representative.

Q. Was George M. Brown there? A. I am not sure.

Q. You are not sure whether George M. Brown was there, or you are not sure whether C. O. Brown was there? A. No, sir.

Q. Could your memory be refreshed on that? A. It probably could, yes.

Q. Was Warren Henley there? A. I am not sure.

Q. Are you sure that somebody from Certain-teed was there? A. Yes, I believe there was.

Q. But you are not sure who that person was? A. No.

Q. Was the Universal Gypsum & Lime Company also represented at that meeting? A. Who was the representative—

Q. (Interposing) My understanding is that Eugene Holland— A. (Interposing) He was the president or receiver at that time, was he not?

Q. Yes, he represented Universal. A. He might have been there, I am not quite sure.

Q. Do you know whether Stephen Kelley was out
3754 there? A. I think he was.

Was Atlantic Gypsum Products Company represented at that meeting? A. I think so.

Q. They were represented by L. I. Neale, vice president, is that correct? A. I think so.

Q. And was Mr. Willard B. Fuller there at the time also? A. I am not sure whether Mr. Fuller was at that meeting or not. I do recall having seen him at one of the meetings in Chicago.

Q. But you are sure of Mr. L. I. Neale? A. I think Mr. Neale was there.

Q. How about Mr. Channing, the secretary and counsel of the Atlantic Gypsum Products Company? A. I believe he was, because I think that is the first time I met Mr. Channing.

Q. Was any person representing Texas Cement Plaster Company at that meeting? A. I don't think so.

Q. And as to American Gypsum Company, did any person represent American Gypsum Company at that meeting, or were they represented? A. I don't recall, I don't recall.

Q. You did testify before the Grand Jury down
3755 here in the District, did you not? A. Yes, sir.

Mr. Knuff: I thought I had Volume 2 of the Grand Jury testimony here. It happens that I do not have that volume here but I will have it here tomorrow, your Honor.

By Mr. Knuff:

Q. Now the meeting was held at the Palmer House in Chicago? A. That is right.

Q. And it lasted two days, is that correct? A. Yes.

Q. Do you recall that Mr. Sewell Avery, at that meeting, outlined the history of the patent litigation over the closed-edge board? A. I have not a very clear recollection of what he said.

Q. Well, do you recall whether or not he did outline or speak about the patent litigation over the closed-edge board? A. I think so.

Q. When you say you "think so", do you mean by that, that that is your best recollection at the present time? A. Yes, it is.

Q. You don't mean that you are just deducing that, you mean that it is your present recollection, is that correct? A. Yes.

3756 Q. And do you recall that Mr. Sewell Avery explained that certain companies in the gypsum industry had undertaken to manufacture a closed-edge board, and in the manufacture of that closed-edge board they had infringed the United States Gypsum Company's patents—do you recall that? A. I don't remember how far he went into that because it was all general knowledge, and whether he would take the time to go over that again or not, I don't remember.

Q. Well, I wonder if you, instead of my asking you these questions, could give me your best recollection of just what you recall Mr. Avery said at that meeting in Chicago. A. Well, I don't think he said very much except that we were all there, he welcomed us as prospective licensees, and—

Q. (Interposing) Were you all in one room? A. Yes.

Q. Those people you have mentioned? A. Up to this point, yes.

Q. Go ahead. A. Then we broke up to discuss our individual licenses.

Q. Outside of the fact— A. (Interposing) I am speaking for our own company.

Q. Yes, I understand that. Your recollection is that Mr. Avery made a short statement in which he welcomed all the prospective licensees, is that correct?

3757 A. Yes.

Q. Don't you recall that Mr. Avery made the statement that it would be a good thing for the industry if all the companies manufacturing board did become licensees of the United States Gypsum? A. I rather think he did, but I don't remember his wording.

Q. When you say you "rather think he did", you mean

by that, do you, that that is your best recollection? A. I have no definite recollection as to what he did say or what he did not say.

Mr. Bromley: Then I move to strike out the previous answer.

Justice Stephens: It may go out.

Mr. Knuff: Just on that particular point, your Honor.

Justice Stephens: That is right.

By Mr. Knuff:

Q. Do you recall that Mr. Avery and Mr. MacLeish both discussed the demoralized price conditions in the gypsum industry for the years 1927, 1928 and 1929? A. No, I don't remember that.

Q. You say you don't remember any such discussion? A. No.

Q. And do you recall that Mr. Avery and Mr. MacLeish stated that this demoralized condition could be cor-
3758 rected by the industry taking out licenses from the United States Gypsum Company whereby United States Gypsum Company would fix the price on gypsum board? A. No, I don't remember that.

Q. You don't remember that now? A. I remember that he spoke about the advantage of taking the board license, but as to carrying it to other products, I don't remember that.

Q. I am talking about the board itself. A. Yes.

Q. Do you recall that Mr. Avery told you that if all companies would take out a license from USG, that that would correct the demoralized condition which the board industry now found itself in? A. The board industry, yes.

Q. That is what I meant to say, and if I didn't say that, I meant to. Do you recall Mr. Avery saying that? A. Yes.

Q. Do you recall Mr. MacLeish also saying that? A. I don't remember whether he repeated that or not.

Q. Do you recall at that time that Mr. MacLeish, or Mr. Avery, illustrated their point by saying that under the General Electric case it was permissible for the owner of a patent to fix the price of a patented product? A. I remember that was mentioned by either one or
3759 the other, yes.

Q. And do you know whether or not the license agreement was gone over, item by item, and the principal points of that license agreement explained either by Mr. Avery or Mr. MacLeish? A. No, not in that way.

Q. Well, how do you recall it? A. We apparently had a draft of a license, to the best of my knowledge, that is as I recall it, and we immediately protested because that draft contained the statement that Ebsary Gypsum Company had infringed the patents of the United States Gypsum Company, and also it had a clause providing for us to pay damages to United States Gypsum Company. We had never been a manufacturer of the closed-edge board up to that point. We had no cases against us, we were not infringers, and we could not sign that contract.

So Judge Rippey and Mr. MacLeish left the group, and between the two of them they thrashed out a license which was applicable only to the United States Gypsum Company and the Ebsary Gypsum Company, and was satisfactory to both companies, which we signed.

That is the history of that. There was not a general discussion as to—would you like to sign this, or would you like to have this in? We went into a session with Mr. MacLeish and Judge Rippey, and thrashed out our troubles, and signed the license.

3760 Q. Isn't it a fact that either Mr. Avery or Mr. MacLeish did discuss the salient features of this proposed new license agreement before the entire assemblage there? A. I don't recall definitely, no.

Q. You don't recall that definitely? A. No.

Q. Do you recall whether or not there was a discussion in the meeting as to abandoning the manufacture of open-edge board? A. No, I don't. Speaking for our own company, we were most anxious to abandon that.

Justice Jackson: Were you making it then?

The Witness: We were making open-edge board, and we had been for just about a year, probably eight to ten months.

By Mr. Knuff:

Q. Did you state that you did intend to abandon the manufacture of open-edge board? A. I don't know whether we made the statement or not, but it was quite evident that we wanted to, because we didn't like it.

Q. I see. It is true that you did cease manufacturing the open-edge board after you became a licensee of USG, is that correct? A. We had a certain quantity of paper left on our hands, in our inventory, at that time, the

3761 time we signed up, which was only suitable for making open-edge board, and as soon as we were

able to use that type of paper up, we abandoned the open-edge board and have never made any of it since.

Q. I see. Did Ebsary Gypsum Company sign the license agreement at that time? A. We signed it in Chicago, yes.

Q. And you signed on the 22nd day of May, 1929, is that correct? A. I believe it was on the 22nd, it was in May, anyway.

Q. Did you sign that the first day of the meeting, or the second day of the meeting? A. It would be my impression or my recollection that the license was talked over between Judge Rippey and Mr. MacLeish on the first day, and a fair copy made which was executed on the second day.

Q. And after you signed the license agreement did USG submit to you a bulletin showing the prices of closed-edge board? A. After we signed. It wasn't immediately upon delivery of the signed license, but it may have been the next day, although I am not certain, or the same afternoon. It wasn't immediately upon its signature, anyway.

Q. I show you, sir, what has been marked for identification as Government's Exhibit No. 404, the same
3762 being a letter, dated May 23, 1929, addressed to George N. Lenci, vice president, and signed by C. Henning, vice president in charge of sales.

(The document referred to was marked as Government's Exhibit No. 404, for identification.)

By Mr. Knuff:

Q. Will you please look at that exhibit, Mr. Lenci? That letter, dated May 23, 1929, is the letter that you refer to as having been given you at the conclusion of the meeting on May 23, is that correct? A. I believe it is, yes, sir.

Mr. Knuff: We now offer in evidence, if your Honor please, Government's Exhibit 404 for identification.

Mr. Bromley: We make only the usual objection.

Justice Stephens: Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 404 was received in evidence.)

By Mr. Knuff:

Q. Now at that time, Mr. Lenci, if my understanding is correct, your company was not manufacturing a closed-edge board—is that correct? A. Not at that time.

3763 Q. And the United States Gypsum Company knew that your company wasn't manufacturing a closed-edge board, is that not correct? A. I believe so.

Q. Didn't you tell them that you were not manufacturing a closed-edge board? A. Well, it was common knowledge that we were not.

Q. Didn't you specifically tell them that you were not manufacturing a closed-edge board? A. Well, I don't know whether we told them so or not. They knew it.

Q. Let's see whether you didn't tell them. The original draft of the proposed license had a clause in it that said that Ebsary Gypsum Company had been infringing the United States Gypsum patents, did it not? A. Yes, that is right.

Q. And didn't you tell the United States Gypsum Company that you were not infringing the United States Gypsum Company patents because you were not manufacturing a closed-edge board? A. Yes, that is probably true, yes.

Q. As a matter of fact, it took you some time before you were able to get into production on the closed-edge board, did it not? A. It was a short time, I don't remember just how long.

3764 Q. It was sometime in July, was it not? A. Probably.

Q. Well, wasn't it sometime in July? A. I haven't got a record of the date, but it was probably about a month or so later.

Q. When you say "probably", do you mean by that, that that is your best recollection now? A. I believe so.

Q. That was sometime in July? A. I think so, yes, sir.

Q. And when you received this bulletin, did you price your open-edge board to follow the prices that were contained in Government's Exhibit 404?

Mr. Bromley: I object to that question on the ground that it assumes facts not in evidence. First, the bulletin on its face in the third line applies only to board manufactured by this company. Second, as I read it, there are no prices set for open-edge board.

I may say, in explanation of what I started out to say, that paragraph 1 refers only to the prices at which the licensee may sell board manufactured by them, embodying the improvements set forth in the Utzman patent, No. 1,034,746. That is the closed-edge patent.

Mr. Knuff: Will you please read my question, Mr. Reporter?

Justice Jackson: I don't believe Mr. Bromley is
3765 through yet.

Mr. Knuff: I am sorry, I thought he was.

Mr. Bromley: Therefore, it seems to me that the question is incompetent because it assumes that the bulletin applies to the board that is not manufactured, which is a fact not in evidence, and it assumes that it also applies to open-edge board, which is also a fact not in evidence.

Mr. Knuff: Now, Mr. Reporter, will you please read my question?

(Thereupon, the pending question was read by the reporter.)

Mr. Knuff: That is all I have asked him, whether the prices of his board followed these prices in here.

Justice Jackson: Do you mean were they the same?

Mr. Knuff: That is right, your Honor.

Mr. Bromley: I think that is a different question.

Mr. Knuff: That is the exact question.

Justice Stephens: Well, if you want to inquire whether the prices at which open-edge board was sold were the same prices as the prices stipulated in this bulletin with respect to the board manufactured and sold under the license, we have already ruled that you can ask that; but the question which you did ask was phrased in a manner which assumed two facts not in evidence. Objection to that is sustained.

You are not foreclosed from inquiring as to what
3766 I just spoke of.

By Mr. Knuff:

Q. The price at which you sold your open-edge board was what, Mr. Lenci? A. I don't remember the exact prices, but they were lower than the prices in the first bulletin.

Q. Isn't it a fact, Mr. Lenci, that you priced your open-edge board to sell at the same price USG had fixed for their "seconds"? A. I don't remember. I know it was much less than the regular price, than the other prices in here—

Q. (Interposing) Much less than what?

Mr. Bromley: Might he finish his answer, please?

Justice Stephens: Finish your answer.

The Witness: Because no matter whether we had a license or not, it didn't overcome the customers' objection to buying open-edge board.

The mere fact that we had a license didn't make him look, didn't make the customer look on the open-edge board with the feeling that he wanted to pay more money for it. We still continued to sell the open-edge board for any price we could get for it.

By Mr. Knuff:

Q. Well, isn't it a fact, Mr. Lenci, that you testified before the grand jury down here that you priced
3767 your open-edge board at the same price that USG specified for their "seconds"? A. I don't remember, I could have my memory refreshed on that, but I do not recall it now, sir.

Q. Isn't that what you did? A. I don't remember.

Q. Well, didn't you price your open-edge board at the same price that USG specified in their bulletins for "seconds"? A. I don't remember.

Justice Jackson: Don't you have those minutes there?

Mr. Knuff: Unfortunately I do not have them. I thought I had, but I am making a note now to be sure to have them here tomorrow, your Honor.

By Mr. Knuff:

Q. Mr. Lenci, gypsum board has always been sold on a delivered price basis, has it not? A. By that you mean a price at destination, instead of a price at the mill?

Q. That is right. A. To my knowledge, yes.

Q. It has always been sold that way? A. Yes.

Q. Say in April 1928, if you had a customer in Rochester who wanted to buy board from you, you would determine the price to that customer by taking your mill price and adding to your mill price the amount of freight
3768 from Wheatland to Rochester, and that would give you the delivered price into Rochester? A. In 1928?

Q. Say in April, April 1, 1929. A. In April of 1929?

Q. That is right. A. No.

Q. How would you do it? A. We would find out what the price was in Rochester, and endeavor to meet that competing price in Rochester.

Q. You would meet the competing price in Rochester? A. Yes. In other words, we were quite new in the business, and we had to meet the conditions as we found them in these various markets.

Q. And if you were selling board in Buffalo, you would find out what the price was in Buffalo, and meet that price, is that correct? A. Yes.

Q. And if you were selling board in Utica, you would find out what the price was in Utica, and you would meet that price, is that correct? A. Yes.

Q. In other words, you didn't determine your price in Rochester or Buffalo or Utica by first taking your mill price and then adding to it the freight from your
3769 mill to Rochester or Buffalo or Utica? A. No, we had to take what the customers were already paying.

Q. I see.

On August 1, 1929, if you were selling board in Rochester, how would you determine that price, or how would that price be determined?

Mr. Oliver: What kind of board are you talking about?

Mr. Knuff: Closed-edge gypsum board that Ebsary was manufacturing under the license.

Justice Stephens: Is there any dispute about that at all?

Mr. Bromley: None.

Mr. Knuff: I just want to get it clear how that price was determined.

Justice Jackson: It was mill price, plus freight, was it not?

Mr. Knuff: Not from Mr. Lenci's mill, however.

Justice Jackson: No, it wouldn't be.

Justice Stephens: Proceed.

The Witness: That is the reason I was looking through here. (Witness referring to Exhibit No. 404) At that time I believe it would be from Oakfield, plus the freight from Oakfield to Rochester.

By Mr. Knuff:

Q. Let's take a specific illustration. Suppose you were selling a 3/8-inch No. 1 grade wallboard in Rochester,
3770 and suppose, further, that that wallboard was a closed-edge wallboard that you manufactured under the license. Now you would take the $20 base price, would you not? A. That is right, that is the mill price.

Q. And to that you would add the freight from Oakfield to Rochester? A. That is right.

Justice Stephens: What Oakfield is this, the town of Oakfield?

Mr. Knuff: Oakfield, New York, your Honor.

Justice Stephens: Where was your plant?

The Witness: At Wheatland, New York.

By Mr. Knuff:

Q. Oakfield is located in Genesee County, is that correct? A. Yes, sir.

Q. And your plant is located in Monroe County? A. Right.

Q. Oakfield is on the New York Central? A. Yes.

Q. And Wheatland is on the B. & O.? A. Yes.

Q. Wheatland is about eighteen miles south and west of Rochester, is that not correct? A. That is correct.

Q. And Oakfield is west and a little bit to the
3771 south of Rochester, is that correct? A. Approximately, yes.

Q. About thirty-six miles from Rochester? A. Yes, sir.

Q. Now in determining the price that you would quote in Rochester, you would take your mill price of $20 a thousand square feet, and to that add the freight rate from Oakfield to Rochester, would you not? A. That is right.

Q. Although the board that you shipped came from Wheatland? A. Yes.

Q. You would ship your board from Wheatland to Rochester, but you would add the freight from Oakfield to Rochester, is that correct? A. At that time, yes.

Q. And if you were selling board in Buffalo, you would likewise quote the mill price, plus freight from Oakfield, is that not correct, from Oakfield to Buffalo? A. Yes, that is the opposite illustration.

Q. And if you were selling in Utica, you would take your mill price of $20, plus your freight from Oakfield to Utica? A. Yes.

Justice Stephens: We will take an adjournment
3772 at this time.

It occurs to the Court to suggest, in respect of the testimony of the witness Gloyd, the possibility of counsel considering agreeing upon written interrogatories which could be presented to Mr. Gloyd and answered without the formality of putting him on the witness stand or having him examined and cross-examined orally. Would that be possible?

Mr. Steffen: We will consider that, your Honor. I want to point out that his memory is apparently bad, and we are entitled to ask leading questions, and it might be very important that we refresh him on something or other in order to obtain an answer.

Justice Stephens: Well, the Court hopes that counsel can work the matter out by some cooperative arrangement which

will get the necessary testimony and at the same time not interfere with his health.

You may announce the recess until tomorrow at ten.

(Thereupon, at 4:00 o'clock p. m., an adjournment was taken until 10:00 o'clock a. m., Wednesday, February 16, 1944.)

3773 IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA,

Plaintiff,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS,

Defendants.

Seventh Floor,
Internal Revenue Building,
Washington, D. C.
Wednesday, February 16, 1944.

The above-entitled cause came on for further hearing at 10:00 o'clock a. m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

APPEARANCES:

(Same as heretofore noted.)

3778 Thereupon, GEORGE N. LENCI the witness on the stand at the time of adjournment, resumed the stand and testified further as follows:

Direct Examination (resumed)

By Mr. Knuff:

Q. Mr. Lenci, I believe yesterday we were talking as to who attended the meeting in Chicago at the Palmer House on the 21st or the 22nd of May, 1929, and I asked you whether or not Certain-teed had attended that meeting, and you said you felt that they had but you were not sure who represented Certain-teed at that time. Do you remember that? A. Yes.

Q. Have you had occasion now to refresh your recollection as to who did represent Certain-teed at that meeting? A. Yes.

Q. Will you tell us who it was, please? A. I believe Mr. C. O. Brown and Mr. Whittemore.

Q. Mr. Audenreid Whittemore and Mr. C. O. Brown, or was it George M. Brown? A. C. O. Brown.

Q. C. O. Brown, you think? A. Yes.

Q. I also asked you yesterday, with reference to
3779 the same meeting in Chicago at the Palmer House, this question:

"Don't you recall that Mr. Avery made the statement that it would be a good thing for the industry if all the companies manufacturing board did become licensees of the United States Gypsum?"

And your answer was:

"I rather think he did, but I don't remember his wording."

Have you had occasion to refresh your recollection since yesterday as to that? A. Yes.

Q. What, if anything, did Mr. Avery say at that time, sir? A. Well, I have given a good deal of thought to that during last evening, to try to put the facts together as I could remember them. And as I recall it, when we met, Mr. Avery made a very short, informal talk, said he was glad to see us all there, and that we were all familiar with the long, drawn-out litigation which had existed in the gypsum industry; and that now that we had the right, following the General Electric decision, to sign a license of this type, or they had the right to issue a license of that type, that he felt that that was a very good move in the industry.

Q. And Mr. Avery did, at that time, talk about the demoralized price conditions in the industry? A. I don't
3780 remember that he mentioned the demoralized price conditions, I really do not.

Q. Before the Grand Jury, sir, you were asked the following question—

Mr. Bromley: (Interposing) May it please the Court, I object to this use of the Grand Jury minutes.

Justice Stephens: Is this for the purpose of refreshing recollection?

Mr. Knuff: That is right, Your Honor.

Mr. Bromley: Then he should be shown the minutes, if anything, and they should not be read to him.

Mr. Knuff: I would like to have the record show just exactly what he did testify to before the Grand Jury, and the only way I can get that in the record is to read it into the record.

Justice Jackson: Are you trying to impeach him or refresh his recollection?

Mr. Knuff: Both.

Justice Jackson: Which are you going to do first?

Mr. Knuff: I am going to try to refresh his recollection—

Justice Jackson: (Interposing) Then why don't you show him the minutes?

By Mr. Knuff:

Q. Mr. Lenci, I want to show you Volume 2 of the
3781 testimony taken before the additional Grand Jury in the District of Columbia on the 18th of April, 1940, and I want to call your attention to page 93 of that testimony, and I want you to read between the places on that page where I have indicated with pencil marks, please. A. (After reading) Yes, I have read it.

Mr. Knuff: Let the record show that I am submitting the volume of the Grand Jury minutes referred to, to counsel for the defendants.

(Grand Jury minutes handed to and examined by defendants' counsel.)

Mr. Knuff: Does the Court care to see it?

Justice Stephens: Hand it to the Court, Mr. Marshal.

(Grand Jury minutes handed to and examined by the Court.)

By Mr. Knuff:

Q. Mr. Lenci, since reading the excerpt from your testimony before the Grand Jury, has your memory been refreshed as to whether or not Mr. Avery did speak about the demoralized price conditions in the industry? A. Yes,

to this extent, that I will have to answer practically the same as I did in that, that probably he did discuss it.

Q. And by "probably" you mean that that is your best recollection? A. Yes.

3782 Q. And when you say that you will have to answer as you did in that, you mean that you will have to answer the same way as you answered before the Grand Jury, is that what you mean? A. That it probably took place, yes.

Q. And again, by "probably" you mean that that is your best recollection? A. Yes, but I can't say, "Yes, he did say this."

Q. You can't give his exact words, is that what you mean? A. I can't give his exact words because I honestly do not remember the wording.

Q. We realize that. But it is your best recollection now, after your memory has been refreshed, that there was some discussion at that meeting about the demoralized price conditions that existed in the board industry; is that correct? A. I don't like to quibble, but I think there probably was. I can't say that there definitely was, because I honestly am not sure.

Q. Do you mean by that that it is your best recollection? A. Yes, all right.

Justice Jackson: Do you realize what you are say-

3783 ing?

The Witness: Yes, sir.

Justice Jackson: You say first that you can't remember; then you say it is your best recollection by saying "probably". Which is it?

The Witness: I mean it is my best recollection that there probably was that discussion.

Justice Jackson: But you don't mean, when you say "probably", that it probably is your best recollection?

The Witness: No.

Justice Stephens: Mr. Lenci, let me say this to you: We don't want you to draw inferences as to what you think, as a matter of probability, happened, because that is the Court's job. What we ask witnesses to do is to testify what did happen, or what was said. Now that doesn't mean that you have to remember or are expected to remember exact words, but it does mean that we are asking you at least to remember, if you can, the substance and effect of a conversation or statement. If you don't remember that, and if you mean by "probably" that you are drawing

an inference as to what occurred, then you shouldn't say that you recollect it. If you do recollect, if you have a recollection at the present time as to what, in substance and effect, was said, then it is all right for you to say so. But please keep that distinction in mind.

The Witness: I understand.

3784 Justice Stephens: In other words, counsel aren't permitted—and I am not suggesting that counsel are trying to—to argue you into a position of saying what probably did take place or probably did not take place, on the basis of an inference. If you don't remember that, say so. You are not guilty of any offense if you don't remember.

Mr. Bromley: I move to strike out all of his testimony on the ground that it is perfectly apparent that he doesn't remember, that all he is doing is inferring.

And in connection with those Grand Jury minutes, I would like to ask him now: You haven't any recollection, now, as to what Mr. Avery said or didn't say on this subject, have you?

The Witness: Not the exact words, no, sir.

Mr. Bromley: I am not talking about the exact words. You haven't any recollection as to whether he said anything about this subject or not, have you?

The Witness: Only so far as I have answered before. I believe that he did.

Mr. Bromley: I move to strike out all of his testimony on the ground that all this witness does is believe or infer, and he doesn't recollect anything.

Mr. Knuff: I think that his answer is perfectly consistent. He said he believed, and when I asked him about that he said he meant that that was his best recollec-

3785 tion. I think his answer is perfectly consistent.

Justice Stephens: Well, the Court thinks it may stand, but the Court will frankly state, Mr. Knuff, that the Court will give practically no weight to it because it is so obviously close to the line of pure speculation or inference.

By Mr. Knuff:

Q. As a matter of fact, Mr. Lenci, the board prices in the industry were at that time demoralized, were they not? A. That is correct.

Justice Jackson: What do you mean by "demoralized"?

The Witness: They were very low. We were selling our materials below cost.

By Mr. Knuff:

Q. And at that time, open-edge board sold on the market at from $6 to $7 a thousand square feet less than the closed-edge board, did it not? A. Yes.

Q. How did USG meet the competition of the open-edge board at that time?

Mr. Bromley: Objected to as incompetent because calling for a conclusion.

Mr. Knuff: This is on cross-examination—

Justice Jackson: (Interposing) Why don't you ask him if he knows?

3786 Mr. Knuff: He does know.

Justice Jackson: Ask him that.

Mr. Knuff: This is cross-examination.

Justice Jackson: I know it is, but you can't call for a conclusion like that on cross-examination.

Justice Stephens: This isn't cross-examination as if the witness had already been examined on direct. These are leading questions.

By Mr. Knuff:

Q. Do you know how USG met the competition of open-edge board? A. Yes, I do.

Q. How did they meet that competition? A. If I might explain, which would possibly make it clearer, they had two grades of board, one which was known as Sheetrock, which was always their first line of material—

Justice Stephens: (Interposing) Who do you mean by "their"?

The Witness: The United States Gypsum Company. And in order to meet competition from other cheaper boards, or open-edge boards, they established a second board, which I believe they called the Crown board, and used that, selling it at a lower price, to meet competition.

Justice Jackson: Competition with what?

The Witness: With the open-edge boards on the market.

3787 By Mr. Knuff:

Q. The Sheetrock that USG was manufacturing at that time was their first quality board, is that correct? A. Yes, sir.

Q. And that board was a highly advertised board, is that correct? A. That is correct.

Q. At that time, the United States Gypsum Company

put on the market a board of inferior quality to the Sheetrock, known as Crown Board, did they not? A. Yes.

Q. And that is what the USG considered their No. 2 board, isn't that correct? A. I believe so, yes.

Q. Did USG at that time mark it second grade board, or second? A. No.

Q. Now what is the difference between a No. 2 board and a second? A. Well, a No. 2 board is a board which is actually manufactured to meet competition, but it is a perfect board in its class, I might say. A "second" is a board of either the first or second grade, which is actually defective in manufacture, has some real imperfection in it, and is not of first class material.

3788 Q. The No. 2 board was a board that was manufactured to certain specifications, while a "second" was an imperfection of a manufactured board; is that right? A. That is correct.

Justice Jackson: I wish you would clear up for me, Mr. Witness, the difference between the Sheetrock, or the No. 1 board, and the No. 2 board. In what way do they differ? A. As I understand it, the Sheetrock board—and when I say "Sheetrock" I mean the first grade board—was made of the very highest class of materials. The paper was perfect, the caliper of the board was perfect, the width was perfect, and it had thorough inspection all the way through and was strictly of first class material. It was like a Cadillac car.

Then, in order to make this competing board, they used a slightly lighter weight of paper. The inspection was not quite as careful. If the board was a 1/32 or 1/16 off in width, it was still usable on the job; it was not imperfect, but it was not absolutely standard. And there were differences of that kind. There might be slight specks in the paper, which would keep it from being used without being painted, or something of that kind.

By Mr. Knuff:

Q. Carrying your analogy with the Cadillac car
3789 further, would you say that the LaSalle might be an illustration of the No. 2 board? A. Yes.

Justice Jackson: Oh, no. (Laughter). I happen to have had both, so I know. (Laughter).

The Witness: I will put it this way: The first grade board was the Cadillac; the second grade board was the Chevrolet; and the "seconds" were the Buick of 1941, where they had to change all the spark plugs.

Justice Jackson: That is right, that had a poor engine. (Laughter).

Mr. Knuff: Will you show the witness Government's Exhibit 404, please?

(Government's Exhibit 404 handed to the witness)

By Mr. Knuff:

Q. Concerning Government's Exhibit 404, I believe you testified yesterday that you received this exhibit on the second day of the meeting that was held at the Palmer House; is that correct? A. Yes.

Q. And that was handed to you? A. Yes.

Q. Did you attend a party at Sewell Avery's home after that meeting? A. Yes.

3790 Q. And who were at that party?

Mr. Bromley: I object to this as immaterial. What is this, some social occasion?

Mr. Knuff: I am not going into what happened at the party other than to see who was at the party. Here you have all the board manufacturers—

Justice Jackson: Is this preliminary to something?

Mr. Knuff: Just to show that they all got together out there.

Justice Jackson: After the licenses were signed?

Mr. Knuff: That is correct.

Justice Stephens: And you are not intending to show any conversations concerning the issues in this case?

Mr. Knuff: I think definitely that it has a bearing on the issues in this case.

Justice Stephens: Are you intending to show what took place at the party, or what was said there, in respect of any issues in this case? If not, how can the fact that these gentlemen attended a social affair have any bearing whatever upon this situation?

Mr. Knuff: I want to show exactly that the only persons that were at that party were the people that were in attendance at the previous meeting at the Palmer House. I am not going to ask this witness to violate any rule of guest and host.

3791 Justice Stephens: We are not thinking that you are going to do that at all, Mr. Knuff, but we are trying to keep the record down to the material issues. It is big enough as it is. How can the fact that these men went to a social party, that circumstance, have any bearing

upon the issues in this case? He has already testified what they did, and there is no dispute about it, anyway.

Mr. Knuff: I think it has a material bearing, but if Your Honor thinks otherwise, I will abide by Your Honor's ruling.

Justice Garrett: In other words, you feel that the Court should conclude, because they had a social party following the business meeting, that—well, what do you ask the Court to conclude from that?

Mr. Knuff: That that was the end of the price war.

Justice Stephens: It seems to the Court a non sequitur. Objection sustained.

By Mr. Knuff:

Q. After you received the bulletin of May 23, 1929, did you telegraph your New York office as to the prices that your New York office should quote on board and lath? A. Yes.

Q. And did you instruct Mr. Diegel to advise the members of your firm as to the prices that should be quoted on gypsum board and gypsum lath?

3792 Mr. Oliver: May I ask what board you are talking about?

Mr. Knuff: Gypsum board and gypsum lath that was sold by Ebsary Gypsum Company.

Mr. Varian: Open-edge or closed-edge?

Mr. Knuff: The witness has clearly answered that at this time they were not manufacturing a closed-edge board. Now it can only mean the open-edge board.

Justice Stephens: Then state it, Mr. Knuff, so that the record will show it.

Mr. Varian: They were purchasing the other board outside, so we might as well have the whole story.

Mr. Knuff: Thank you very much, I am glad to know that.

What is my question?

(The question was read by the reporter as follows:

"Q. And did you instruct Mr. Diegel to advise the members of your firm as to the prices that should be quoted on gypsum board and gypsum lath?"

By Mr. Knuff.

Q. (Continuing) —either open or closed-edge? A. I wired Diegel to notify our salesmen to quote these prices.

Justice Jackson: On what, closed or open-edge board?

The Witness: On our open-edge board?
3793 Justice Jackson: Your open-edge board?
The Witness: Yes, sir.

By Mr. Knuff:

Q. Did Mr. Diegel prepare a letter that was signed with your name? A. Yes.

Justice Stephens: I don't quite understand you, Mr. Lenci. You say you wired Mr. Diegel to quote these bulletin prices on open-edge board?

The Witness: To quote prices on open-edge board. He didn't ask me what the prices were, yet.

Justice Stephens: I understood he was referring to these bulletin prices in Exhibit 404, and I thought you testified yesterday that you couldn't get bulletin prices on open-edge board because the trade wouldn't take it at those prices.

Mr. Knuff: If your Honor pleases, this is preliminary to clearing that up.

Justice Stephens: Very well.

Mr. Bromley: I don't think the record should be left this way. It seems to me that the record looks as though the witness had been talking about bulletin prices; whereas, he said yesterday that, of course, he wasn't talking about bulletin prices.

Justice Stephens: That is the Court's understand-
3794 ing, because he is being examined on Exhibit 404.

Mr. Knuff: I think if Your Honors will bear with me just a minute, we will have this whole thing cleared up.

Justice Jackson: All right.

By Mr. Knuff:

Q. Mr. Lenci, I show you what has been marked for Identification as Government's Exhibit 405.

(The document referred to was marked as Government's Exhibit No. 405 for Identification.)

By Mr. Knuff:

Q. Will you look at that exhibit and state whether or not that is the letter that was prepared pursuant to the telegram that you sent? A. Yes.

Justice Stephens: Will you identify that for us so we can tell what you are talking about?

Mr. Knuff: It is dated May 23, 1929, Your Honor, addressed to the Ebsary Gypsum Company, Newark, New

Jersey, Attention Mr. Ed. A. Niel, Jr., and signed Ebsary Gypsum Company, George N. Lenci, Vice-President.

Mr. Oliver: I would like to see a copy of it.

Justice Stephens: Have defendants' counsel a copy of it?

Mr. Bromley: We have just been handed a copy
3795 of it now. We have never seen it before.

Justice Stephens: Take your time and examine it.

Mr. Knuff: We now offer in evidence, if Your Honors please, Government's Exhibit No. 405.

Mr. Bromley: We make only the usual objection to it.

Justice Stephens: Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 405 was received in evidence.)

By Mr. Knuff:

Q. Now, Mr. Lenci, will you please refer to Government's Exhibit 405, and also refer to Government's Exhibit 404. In Government's Exhibit 405, you quoted, did you not, "3/8" Gypsum Lath (16x48—16x32—32x48) @ $13.50 per M ft. F.O.B. Mill"? A. That is correct.

Q. And will you refer now to Government's Exhibit 404. That is the same price that Government's Exhibit 404 contains for closed-edge lath, is that not correct?

Justice Stephens: Where is that?

Mr. Knuff: That will be found, Your Honor, right after the word "SECONDS", about a quarter of an inch below the word "SECONDS" you will see that.

3796 Justice Jackson: Is that lath?

Mr. Knuff: Plasterboard is lath.

It is the paragraph that begins: "1/4" and 3/8" Gypsum Plasterboards"—

Justice Stephens: (Interposing) "either bundled or unbundled"—

Mr. Knuff: (Interposing) Yes, "all sizes—$13.50 per M sq. ft."

By Mr. Knuff:

Q. The price that is mentioned in Government's Exhibit 405 for gypsum lath, open-edge gypsum lath, was the same price that was furnished you in Government's Exhibit 404 for closed-edge lath, is that not correct? A. Yes.

Justice Stephens: Now I don't understand that, because this item "3/8" Gypsum Lath", which you refer to, in Exhibit 405, doesn't say whether it is open-edge or not.

Mr. Knuff: Mr. Lenci has testified that that is what he was telling his salesmen to quote on open-edge lath.

The Witness: That is correct, we were not making closed-edge board at that time.

By Mr. Knuff:

Q. And the lath mentioned in Government's Exhibit 405 is open-edge lath, is that correct? A. Yes.

3797 Mr. Knuff: Is that clear to Your Honors now?

Justice Stephens: Yes, thank you.

Justice Jackson: Yes.

By Mr. Knuff:

Q. Now refer to Government's Exhibit 405, and the price of open-edge wallboard "4x6-12' long 15.00 per M ft. F.O.B. Mill"—do you see that? A. Yes.

Q. And that was the price for open-edge wallboard, is that not correct? A. Yes.

Q. Now refer to Government's Exhibit 404—"3/8"—Gypsum Wallboard SECONDS—$15.00 per M sq. ft."

Mr. Knuff: Do your Honors see that? It is just above the paragraph in which 1/4" and 3/8" Gypsum Plasterboards are mentioned. It immediately follows the #1 and #2 Grade Gypsum Wallboard quotations, and there is probably a space of a quarter of an inch—

Justice Jackson: (Interposing) It says there, "Gypsum Wallboard SECONDS"?

Mr. Knuff: That is right.

By Mr. Knuff:

Q. Now the price that you mentioned in Government's Exhibit 405 was the same price that was furnished

3798 you for closed-edge gypsum wallboard Seconds in Government's Exhibit 404, is that correct? A. That is correct.

Q. I show you what has been marked for Identification as Government's Exhibit 406, the same being a copy of a letter dated May 23, 1929, addressed to "All Salesmen", and signed "George N. Lenci". Will you please look at that exhibit, sir? A. Yes, sir.

(The document referred to was marked as Government's Exhibit No. 406 for Identification.)

Mr. Knuff: Before taking up Exhibit 406, there is an item on Exhibit 405 that I inadvertently overlooked.

By Mr. Knuff:

Q. Mr. Lenci, will you get before you Government's Exhibit 405, please? A. I have it.

Q. You will notice on the left-hand side of that exhibit there are some notations in longhand. Do you recognize that writing? A. Yes, it is mine.

Q. It is your writing? A. Yes.

Q. And as I read it, it says: "To be discontinued
3799 as soon as new board is ready", is that correct? A. Yes.

Q. What did you mean by that? A. If you will notice, right to the right of that the open-edge has a black mark alongside of it.

Q. I notice it. A. And I believe that I intended to say that the open-edge board would be discontinued as soon as the new board was ready.

Q. And this reference here meant that as soon as you got into production on your closed-edge board, you were going to discontinue the production of your open-edge board, is that correct? A. Yes.

Q. Now then, Exhibit 406 for Identification is a memorandum to your salesmen prepared for your signature, is that correct? A. Yes.

Mr. Knuff: We now offer in evidence Government's Exhibit 406.

Mr. Bromley: We make only the usual objection.

Justice Stephens: Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit
3800 No. 406 was received in evidence.)

By Mr. Knuff:

Q. And Government's Exhibit 406 contains the instructions that were sent out to your salesmen in order that they would be able to quote on open-edge lath, and open-edge wallboard; is that correct? A. That is right.

Q. And the prices mentioned in Exhibit 406 are the same prices that were mentioned in Government's Exhibit 405, is that correct? A. Yes.

Q. Now will you get before you, sir—

Justice Stephens: (Interposing) What is this handwriting at the bottom of Exhibit 406? If that has any bearing, since it is all in evidence we ought to have it read to us, because some of it I don't understand. What does that say, Mr. Lenci?

The Witness: Well, the series of figures there are, I think, the weights of the board. And then the comment at the bottom is "Joint Filler $3.60 per case F. O. B. Mill".

Mr. Knuff: I was going to take that up later, Your Honor.

Justice Garrett: Mr. Knuff, will you pardon me if I ask the witness to return a moment to Exhibit 405?

3801 Mr. Knuff: Certainly.

Justice Garrett: I didn't quite understand this. In explaining the handwriting on the left side of the page, I understood the statement in the question put to you to be that it was your intention to discontinue the manufacture of open-edge board when the new board was ready.

The Witness: That is correct.

Justice Garrett: And it had reference, then, not to the prices named here, but to the discontinuance of the manufacture of open-edge board?

The Witness: Yes. If I might explain, if you care for it, it is impossible to make both an open-edge board and a closed-edge board at the same time. You have to make one or the other, because your equipment is different for the two types of board. And when we stopped making the open-edge board we were through with it for good.

Justice Garrett: I would have interpreted that, myself, to mean that they were to discontinue the quotation of prices on open-edge board when the new board went into production. But, of course, I take your interpretation.

The Witness: If you have in mind if we had any open-edge board still in stock, of course we would have to sell that at this price.

By Mr. Knuff:

Q. Isn't Judge Garrett's understanding the correct
3802 understanding, Mr. Lenci, that is, that after your closed-edge board machine was put in operation, you were going to cease quoting on your open-edge wallboard? A. If we had any stock, we would have to sell it. After we had sold our inventory of open-edge board—

Q. (Interposing) And you had your new—

Justice Stephens: (Interposing) Let him finish his statement.

The Witness: After we had sold our inventory of open-edge board we would be through with that, and naturally that price would cease.

Justice Stephens: You would make no more of that board?

The Witness: We would make no more of that board.

Mr. Knuff: Does that clear it up for you, Judge Garrett?

Justice Garrett: I think so.

So long as you had any open-edge board to sell, you were going to sell it at these prices?

The Witness: If we could get that much for it.

Justice Garrett: Yes, if you could get it.

The Witness: That is right.

Justice Garrett: In other words, those were the prices that they were authorized to quote, that your salesmen were authorized to quote?

The Witness: That is right.

Justice Garrett: So long as you had any open-edge
3803 board on hand, no matter whether you then had discontinued its manufacture or not?

The Witness: That is right, that is correct.

By Mr. Knuff:

Q. Mr. Lenci, Mr. Varian has said that at this time you were buying closed-edge board; is that correct? A. We had bought a few cars, I don't know how many, but very few cars of board, and I don't know whether it was wallboard or lath.

Q. But you had bought either lath or board, is that correct? A. We had bought some, yes.

Q. And from whom did you buy that?

Mr. Bromley: I object to this as immaterial. This is the same matter that was ruled on yesterday.

Mr. Knuff: This is not the same matter that was ruled on yesterday. Here we have now a licensee buying board, apparently from another licensee, and this comes, I think, within the charge of the conspiracy in the complaint.

Justice Jackson: Why don't you phrase your question that way? You didn't ask him whether it was after he took the license or not.

By Mr. Knuff:

Q. After you took the license, and before you got your plant in operation, did you buy any closed-edge board
3804 or lath? A. Well, now, I want to answer that very clearly so that all will understand me. Before we took

our license, our plant had been in operation for about 8 or 10 months.

Q. That is right.

Justice Jackson: Making what?

The Witness: Making open-edge board.

And after we started making open-edge board, we did not buy any board from anybody else, because we had our own board. So consequently, we were not buying board from another manufacturer either during the time when we were manufacturing an open-edge board or after we took the license.

By Mr. Knuff:

Q. I understood Mr. Varian to say that after you took the license you had purchased some closed-edge board? A. No, that is not correct.

Mr. Varian: I was only referring to his testimony as to what he bought from Universal, which he testified to yesterday.

By Mr. Knuff:

Q. You now say, Mr. Lenci, that you were not—and did not, after you became a licensee of USG—purchasing closed-edge board from any other manufacturer? A. To the best of my recollection, we didn't.

3805 Q. Did you sell any closed-edge board to any other manufacturer after you became a licensee? A. Well, very much later on.

Q. Very much later on? A. Yes. I have in mind when the Newark Plaster Company had their fire, and we sold some board to them at that time.

Mr. Bromley: That was in 1940, you mean?

The Witness: Yes. And in order that the record may be complete, I think we sold a small quantity to the Atlantic Gypsum Company.

By Mr. Knuff:

Q. That is what I was coming to. You secured permission from the USG to sell to Atlantic at a discount, did you not? A. Yes.

Q. And you did sell to Atlantic at a discount? A. Yes.

Q. And for how long a period did you sell to Atlantic? A. Not very long, they did not take very much from us.

Q. I realize, of course, that it is almost impossible to fix dates, but can you give us an approximate date when this

board was sold to Atlantic? A. I would say it was probably a year or two prior to the purchase of the Atlantic by
3806 National, somewhere in the middle 30's.

Q. Somewhere in the middle 30's? A. Yes.

Q. Now did you sell board to any other board manufacturer, other than Newark and Atlantic? A. I don't remember.

Q. Either metallized, perforated or plain? And by "board", I mean wallboard and lath. A. I don't recall any.

Justice Stephens: The Court will take the morning recess at this time.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

3807 Justice Stephens: Proceed.

By Mr. Knuff:

Q. Will you get before you, Mr. Lenci, Government's Exhibit No. 404, please? A. Yes, sir, I have it.

Q. Turn to page 3, of that exhibit, if you will. You will notice at the bottom of that page, this statement:

"The following are billing weights used at all basing points:"

Do you notice that? A. Yes.

Q. I show you, sir, what has been marked for identification as Government's Exhibit 407, being a letter dated May 24, 1929, addressed to the Ebsary Gypsum Company, Newark, New Jersey, attention of Mr. Ed. A. Niel, Jr., and signed Ebsary Gypsum Company, Inc., by George N. Lenci, vice president.

(The document referred to was marked as Government's Exhibit No. 407, for identification.)

By Mr. Knuff:

Q. Is that a letter, Mr. Lenci, that was sent out over your signature to your Newark office? A. It was sent out. I don't know that I signed it because I think Diegel wrote the letter in my absence.

Q. But you had previously authorized him, in your
3808 telegram, to do so, had you not? A. I don't remember.

Justice Stephens: Who did you say you thought wrote it?

The Witness: Mr. Diegel, who was my assistant. But I don't remember.

By Mr. Knuff:

Q. You do know that this letter was sent out from your office, do you? A. Oh, yes.

Q. And you know that your name was signed to it? A. Yes.

Mr. Knuff: We offer in evidence Government's Exhibit No. 407.

Mr. Bromley: We make only the usual objection.

Justice Stephens: Received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 407 was received in evidence.)

By Mr. Knuff:

Q. Now the weights that are mentioned in Government's Exhibit 407 are the same weights that are mentioned at page 3 of Government's Exhibit 404, is that correct? A. Yes, they are the same.

3809 Q. And the weights that you used in Government's Exhibit 407 were those that you used for open-edge board, is that correct? A. Yes.

Q. In figuring the billing on your open-edge board, Ebsary Gypsum Company used the weights mentioned in Government's Exhibit 407, is that correct? A. Yes, with this exception, that I don't think we were able to get the full price that we mentioned.

Q. I am not asking you about the price. I said—in sending out quotations and in billing your customers for open-edge board, you used the weights that are mentioned in Government's Exhibit 407?

Mr. Bromley: It seems to me that that question ought to be separated, in fairness, between sending out quotations and billing, because they are two entirely different things.

Justice Stephens: Read the question.

(Thereupon, the pending question was read by the reporter.)

Justice Stephens: The question is double. Ask first about quotations, and then about billing. Sustained.

Mr. Knuff: All right.

By Mr. Knuff:

Q. In sending out quotations on open-edge board, you used the weights that are mentioned in Government's

3810 Exhibit 407, is that correct? A. Yes, sir.

Q. And in billing your customers for open-edge board you used the weights mentioned in Government's Exhibit No. 407, is that correct? A. I can't say "yes" to that.

Q. You can't? A. I don't know.

Q. Before you became a licensee, was it your practice to use arbitrary or fictitious weights in quoting on board, or did you use the actual weights? A. We didn't use either one.

Q. What did you use? A. We had to meet conditions as we found them in each market we went into. In other words, we met the condition as we found it. We didn't make up a price of our own and say, "That is our price." We were only a small producer, and we had to take conditions as we found them, and if we were able to sell at those prices, all right.

Justice Stephens: I thought the question was about weights, Mr. Lenci.

The Witness: It was. He wanted to know if we took a mill price and added an arbitrary weight to figure the cost to destination.

Justice Stephens: I see. You are talking about the
3811 time before the license?

The Witness: Yes. That was the question.

By Mr. Knuff:

Q. You say that you had to meet the competition prior to the time you became a licensee, is that correct? A. Yes.

Q. And in quoting on board, you met that competition by quoting the prevailing price, or by quoting a lower price, isn't that correct? A. Yes.

Q. You couldn't cut the price on the freight, could you, that was established by the railroad? A. We had nothing to do with the freight.

Q. So that whenever you did meet that competition, you met it by cutting on the price of board, isn't that correct? A. Yes.

Q. On your mill price of board? A. It eventually worked back to the mill price, because we took the selling price, less the actual freight which had to be paid, leaving the price at the mill.

Q. Now turn to Government's Exhibit No. 404 again, please. On page 2 you will notice that it says:

"Truck deliveries from New Brighton Mill add $3.00 to New Brighton base prices, or $2.00 to Oakfield delivered carload prices."

3812 Do you notice that? A. Yes.

Q. Can you tell us what the business reason was, if you know, for having the truck prices increased over the New Brighton price, or over the Oakfield carload price?

Justice Stephens: Will you please read the last two questions to me, Mr. Grover?. I don't quite clearly get what you are asking about, Mr. Knuff:

(Thereupon, the record was read by the reporter as requested.)

The Witness: I don't know what the reason for that was.

By Mr. Knuff:

Q. On that same page you will notice this statement:

"Truck deliveries from New York and Newark Warehouses, add $2.00 per M sq. ft. to warehouse prices."

Do you notice that? A. Yes.

Q. Can you tell us, if you know, what the business reason was as to why truck deliveries were increased $2 over the warehouse price? A. Well, the material was brought by rail to New York and Newark, and if an additional service had to be given by way of trucking, $2 was added for that additional handling, warehousing and delivery by truck.

Q. I see. In other words, this $2 represented an

3813 additional service that was performed— A. (Interposing) For the customer.

Q. For which the customer was charged $2 over the warehouse price, is that correct? A. Over the price at the warehouse, or f. o. b. cars.

Q. I notice on page 2, on the right-hand side of that page, that there are some notations such as "22.15", and then I can't make out what that other writing is. Can you interpret that for us? A. I wrote it. I could speculate on what that is, but I don't know whether it would be true.

Q. I don't want you to speculate. If you haven't any present recollection— A. (Interposing) I don't have.

Q. You don't have any? A. No.

Q. I also notice just following the statement:

"Truck deliveries from New York and Newark Warehouses, add $2.00 per M sq. ft. to warehouse prices", that there are some penciled notations such as "3/8—15 1/2; 1/2—" and then I don't know whether that is "17" or "170"; and then following the 17 or 170, whichever it is, there is "23.10".

All that is bracketed and to the right of the bracket you

will notice what looks to me like the word "trucks". A. It is "trucked".

3814 Q. Trucked? A. Yes.

Q. What does that mean? A. If I might explain, in the early stages of the plasterboard business, in New York, the customers bought it at so much per board, and those prices there are for 15-1/2 cents on 3/8-inch board, and 17 cents on 1/2-inch board, represented as the price per unit, per board, rather than the price per thousand square feet.

Q. And what is that $23.10, what is that figure? A. That would be $23.10 per thousand square feet.

Q. Delivered how? A. Delivered by truck.

Q. From where? A. That is what that memorandum would mean, I believe.

Q. From where, from the Newark and New York warehouses? A. I think so, because it follows immediately after that.

Justice Stephens: That "15-1/2" means what?

The Witness: 15-1/2 cents per board.

Justice Stephens: What does the figure "17" mean?

The Witness: 17 cents per board for 1/2-inch board.

By Mr. Knuff:

Q. Was that practice of quoting "per board" abandoned? A. It eventually was.

Q. It eventually was abandoned? A. Yes.

3815 Q. It was a recognized practice in the industry before this time, and at this time? A. Yes. It goes back a great many years. The custom in New York had always been to buy what they called "plasterboards" on a unit basis. It goes 'way back even before the time that any so-called gypsum board was made. It goes back to the early stucco board.

Q. And the 15-1/2 cents represented the price per board for 3/8-inch board, is that correct? A. Yes.

Q. And the 17 cents represented the price per board for 1/2-inch board? A. That is right.

Q. Mr. Lenci, I show you what has been marked for identification as Government's Exhibit No. 408, the same being a letter addressed to Mr. George N. Lenci, dated May 24, 1929, signed United States Gypsum Company by C. Henning, Vice President in Charge of Sales.

(The document referred to was marked as Government's Exhibit No. 408, for identification.)

Justice Stephens: Is that in this additional set?

Mr. Knuff: It came in with the list you had yesterday, and it should follow the letter of May 23, 1929, Gov-
3816 ernment's Exhibit 404, which was the first bulletin issued by USG after the license was signed.

Justice Stephens: What is the date of the letter?

Mr. Knuff: The date of Exhibit 408 for identification is May 24, 1929. On the left hand side of this letter, your Honor, you will find a grand jury exhibit number "8". Maybe that will help you to locate it a little more expeditiously.

Justice Stephens: I will find it eventually. It is not in this set.

Mr. Knuff: I will see that your Honor gets a copy of it.

Justice Stephens: Excuse me, I have it now. I am sorry to have delayed you.

By Mr. Knuff:

Q. Mr. Lenci, did you receive Government's Exhibit 408? A. Yes.

Q. Was that handed out at the meeting in Chicago, or did that come to you by mail, if you know? A. I think it came by mail.

Q. It came by mail? A. Yes.

Mr. Knuff: If your Honor pleases, we now offer in evidence Government's Exhibit No. 408.

Mr. Bromley: We raise only the usual objection.

Justice Stephens: Let me read it, please.

Mr. Knuff: Pardon me.

3817 Justice Stephens: Received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 408 was received in evidence.)

Mr. Knuff: I call your Honors' particular attention to paragraphs 2 and 5 of that letter, paragraph 2 starting, "Minimum Prices to Manufacturers and Jobbers", and so forth; and paragraph 5 beginning with, "You will please send us a list of the jobbers", and so forth.

By Mr. Knuff:

Q. Mr. Lenci, on May 24, 1929, you were selling gypsum board and lath to jobbers, were you not? A. I don't remember.

Q. You say you don't remember whether or not you had any jobbers? A. I don't remember at that time. We never

had very many, and unless you refresh my memory, I can't remember.

Q. Do you remember a firm by the name of Coeyman? A. Yes.

Q. Were they jobbers? A. Yes.

Q. And were you selling gypsum products to Coeyman at this time? A. I don't remember whether it was
3818 just at that time, or not.

Q. Well, at approximately that time. A. We had sold him as a jobber.

Q. You had? A. Yes.

Q. You can't think of any others? A. Sometime prior to that I think we sold the Abbey Company. I don't remember any others just now.

Q. But your best recollection is that you were selling to jobbers at or about this time, but the number of jobbers you cannot now tell us, is that correct? A. They were very few.

Q. Very few? A. Yes.

Q. In the phrase, "Minimum Prices to Manufacturers and Jobbers", you notice the word "Manufacturers" there? A. Yes.

Q. What was your understanding as to the meaning of "Manufacturers"? Did you understand that that meant that that was the price that you could sell the manufacturers who were manufacturing gypsum products but not manufacturing board, or did you understand by the word "manufacturers" that that meant that you could sell to a manufacturer who was also manufacturing board? A. I
3819 don't remember whether there was any distinction made or not.

Q. I see. You will notice that the last paragraph of the letter states:

"You will please send us a list of the jobbers to whom you are selling patented board."

Do you notice that? A. Yes.

Q. Did you send that list to Mr. Henning? A. I think so.

Q. You are not sure at the present time? A. I am not sure, but I think we did.

Q. Do you know, Mr. Lenci, whether other manufacturers were selling through jobbers at this time, or about this time?

Justice Stephens: By "other manufacturers", do you mean other licensees?

Mr. Kniff: Other than Ebsary.

Justice Stephens: Other licensees?

Mr. Knuff: Other licensees, yes, sir.

Justice Stephens: You can answer that "yes" or "no", whether you know or not.

The Witness: I am not sure, no.

By Mr. Knuff:

Q. You are not sure whether they were? A. No. The reason I hesitate on that is that we were doing busi-
3820 ness in a very limited territory.

Q. Did you have any trade information on it at all? A. I don't recall any.

Q. I show you, Mr. Lenci, what has been marked for identification as Government's Exhibit 409, the same being a letter, dated May 25, 1929, addressed to Mr. George N. Lenci, and signed United States Gypsum Company by C. Henning, Vice President in Chg. Sales.

(The document referred to was marked as Government's Exhibit No. 409, for identification.)

By Mr. Knuff:

Q. Did you receive that letter, Mr. Lenci? A. Yes.

Mr. Knuff: We now offer in evidence Government's Exhibit 409.

Mr. Bromley: We make the usual objection.

Justice Stephens: Received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 409 was received in evidence.)

By Mr. Knuff:

Q. You have before you Government's Exhibit No.
3821 404? A. Yes.

Q. You will notice in Government's Exhibit 409 the words, "Acme, Texas"? A. Yes.

Q. That was an addition to the basing points mentioned in Government's Exhibit 404, was it not? By that I mean that Acme, Texas, was added to the list of basing points that were contained in Government's Exhibit 404, is that correct? A. Yes.

Q. Now will you look at the same paragraph where the towns of Oakfield, New York, Gypsum, Ohio, Plasterco, Virginia, and so forth, are mentioned. Do you notice that? A. Yes.

Q. Are these places where the United States Gypsum Company, if you know, had mills? A. I know that they had mills in several of those places.

Q. In what places? A. Well, there is no question about Oakfield, or Gypsum, or Plasterco, or Fort Dodge, Iowa, or Southard, Oklahoma.

Q. What about Grand Rapids? A. I am not sure.

Q. What about Acme, Texas? A. I don't remember.

Q. And Sweetwater, Texas? A. I don't know as
3822 to that.

Q. I show you what has been marked for identification as Government's Exhibit 410, the same being a letter dated June 7, 1929, addressed to George N. Lenci, and signed by C. Henning, Vice President in Charge of Sales.

(The document referred to was marked as Government's Exhibit No. 410, for identification.)

By Mr. Knuff:

Q. Did you receive that letter, Mr. Lenci? A. Yes.

Mr. Knuff: I now offer in evidence Government's Exhibit 410.

Mr. Bromley: The usual objection.

Justice Stephens: Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 410 was received in evidence.)

By Mr. Knuff:

Q. On the first page of that letter there is a penciled notation at the left-hand side, at about the middle of that page. Can you tell us what that means? A. Well, it reads, "#2 & Seconds".

Q. What is the meaning of that, sir? A. I be-
3823 lieve that was just to call attention to the fact that the prices on No. 2 board and seconds had been changed from the previous bulletin.

Q. Now at that time do you know whether United States Gypsum was selling seconds? A. No, I don't know.

Q. You don't know whether they were or not? A. No.

Q. Do you know what their policy was as to the sale of seconds? A. No, I couldn't state that, I don't know.

Q. You don't know? A. No.

Q. I show you what has been marked for identification as Government's Exhibit 411, the same being a letter dated

June 19, 1929, addressed to George N. Lenci, Vice President, and signed United States Gypsum Company, C. Henning.

(The document referred to was marked as Government's Exhibit No. 411, for identification.)

By Mr. Knuff:

Q. Did you receive that letter, Mr. Lenci? A. Yes.

Mr. Knuff: I now offer in evidence Government's Exhibit No. 411.

3824 Mr. Bromley: The usual objection.

Justice Stephens: Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 411 was received in evidence.)

By Mr. Knuff:

Q. Will you look at the last paragraph of that letter, reading, "For shipment in straight or mixed cars delivered to dealers in Grand Rapids, Mich., switching limits, add $1.00 per M sq. ft. to prices listed above."

Do you notice that? A. Yes.

Q. Can you tell us what the business reason was, if you know, why $1 was added to the prices listed above in that letter? A. Well, the prices listed above are the prices f. o. b. cars, Grand Rapids mill, and in order to make the price to the customer within the switching limits of Grand Rapids, $1 was added to cover the cost of loading and the switching charge, the handling by the railroad, to the customer's yard, the customer's siding.

Q. Was that an average cost, Mr. Lenci, if you know? A. I have no way of knowing.

Q. You haven't any way of knowing? A. I have

3825 no way of knowing.

Q. I show you, Mr. Lenci, what has been marked for identification as Government's Exhibit 412, the same being a letter, dated June 19, 1929, addressed to Mr. George N. Lenci, Vice President, and signed, United States Gypsum Company, C. Henning.

Did you receive that letter? A. Yes.

(The document referred to was marked as Government's Exhibit No. 412, for identification.)

Mr. Knuff: I now offer in evidence Government's Exhibit 412.

Mr. Bromley: The usual objection.

Justice Stephens: Received in evidence, subject to the usual declaration with respect to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 412 was received in evidence.)

By Mr. Knuff:

Q. Mr. Lenci, will you look at the block on that letter, on the first page, dealing with the minimum prices to dealers' warehouses in Brooklyn, Queens, Manhattan, and Bronx Counties. Do you notice the block that I refer to?

3826 A. Yes.

Q. You will notice that there is a minimum truckload of 10,000 square feet mentioned. Do you notice that? A. Yes.

Q. And going down the page into the block relating to the delivered price in truck loads in Nassau County, Long Island, and Westchester County, New York, you will notice that there was a minimum truckload of 8,000 square feet. A. Yes.

Q. And going down to the next block, you will notice that there was a minimum truckload of 7,500 square feet—do you notice that? A. Yes.

Q. Now Government's Exhibit 412 was the first price bulletin in which USG had prescribed minimum truckload quantities, is that correct?

Mr. Bromley: I object to that question as assuming a fact not in evidence, or contrary to the evidence, because this prescribes a price for a truckload.

Mr. Knuff: My question has only been directed as to the minimum truckload requirements. I haven't asked the witness anything about price.

Mr. Bromley: My objection is that there is no minimum truckload requirement. There is a specification of a price for a minimum truckload.

3827 Mr. Oliver: I object on the ground that he is asking the witness—

Justice Stephens: (Interposing) Just a moment. Let us read this so we can pass on one objection at a time.

I suppose it is a matter of interpretation, Mr. Bromley, whether that is a price on a minimum truckload basis, or whether it is a minimum truckload. That being true, the question might be objectionable, Mr. Knuff, as being double. You may have to have some explanation as to which this is.

By Mr. Knuff:

Q. Mr. Lenci, this is the first bulletin—

Justice Stephens: (Interposing) Just a minute, Mr. Knuff. Did you have something, Mr. Oliver?

Mr. Oliver: My point was that the question called for a conclusion. He is asking if this was the first bulletin issued by United States Gypsum covering that. How does the witness know?

Justice Stephens: The question meant—issued to him, as I understood it. Did you understand this question to mean, Mr. Lenci, the first bulletin you received in which the subject of minimum truckloads was mentioned?

The Witness: That is the way I understood it. That is the reason I was looking at these other papers to see if truckloads were mentioned in there.

By Mr. Knuff:

3828 Q. Mr. Lenci, this was the first bulletin you had received from the United States Gypsum Company which prescribed a minimum truckload quantity at a prescribed price, is that correct? A. I believe it is.

Q. Can you tell us what the business reason was, if you know, why there was a minimum so prescribed? A. Well, I could only speculate as to what their thoughts were when they issued this.

Q. You don't know, do you? A. We had nothing to do with the issuance of it.

Q. Would your answer be the same with reference to what the business reason was as to why an 8,000 square foot minimum truckload was prescribed? A. It would have to be the same.

Q. Now at this time were you manufacturing closed-edge board? A. I am not sure. We must have been very close to it. We may have been.

Q. Did you comply with the United States Gypsum price bulletins, did your company comply with the United States Gypsum price bulletins, as to price, terms and delivery requirements? A. Only if we were making the closed-edge board.

3829 Q. In other words, if you were not delivering a closed-edge board you didn't have a minimum truckload requirement, is that what you mean? A. Only as we established one, due to our own economic conditions.

Q. Were you shipping into Brooklyn and Queens and Manhattan by truck? A. Yes.

Q. And what size trucks were you using at that time? A. What do you mean by "what size"?

Q. Well, two-ton or a truck on which you could load 5000 or 10,000 square feet? A. We didn't own any trucks, we hired trucks.

A. And we hired the heavy trucks, large trucks.

Q. On the second page of Exhibit 412 you will notice that the name "Middlesex County, N. J." appears, and underneath it a block of towns. Do you see that? A. Yes.

Q. Could you deliver—

Justice Jackson: (Interposing) Did you say "would" or "could"?

Mr. Knuff: Could.

By Mr. Knuff:

Q. Could you deliver at the prices specified on page 1 of this bulletin, and in the minimum quantities specified
3830 on page 1 of this bulletin, at the bottom of the page, by truck, into any towns in Middlesex County, New Jersey, not mentioned on page 2 of this bulletin?

Mr. Bromley: I object to that unless he means to call for his understanding of the bulletin.

Justice Stephens: What he could do—

Mr. Knuff: (Interposing) Well, I meant of course whether he understood that he could only deliver into the towns mentioned, or whether he could deliver to any towns in Middlesex County which were not mentioned.

Justice Jackson: By reason of this bulletin?

Mr. Knuff: That is right. Suppose I start over again.

By Mr. Knuff:

Q. There were certain towns mentioned on page 2 of Exhibit 412 as being in Middlesex County, New Jersey. Now those towns were not the only towns in Middlesex County, New Jersey, were they? A. No.

Q. There were other towns in that county? A. I believe so.

Q. Was it your understanding that you could not deliver into those unnamed towns, by truck, the minimum quantity of board at the specified price? A. No, I think these towns were merely named here as a matter of convenience. There was no limitation. If there was any town in
3831 Middlesex County that was not on this list, we still could deliver to it.

Q. You still could deliver to it? A. Oh, yes. This was merely a matter of convenience, I believe, and there was no limitation on it.

Justice Stephens: What is the handwriting on the left-hand side of page 2 of this exhibit, if you know?

The Witness: I haven't any idea as to whose writing that is. It isn't mine. It is bad, but it isn't mine.

Justice Stephens: Very well.

By Mr. Knuff:

Q. Is it your understanding that you were not limited by the bulletins to the towns and territories specifically covered by the license bulletins? A. Yes. You are referring to these—

Q. (Interposing) I am referring generally, sir, to your understanding of the bulletins.

Suppose that the license bulletin mentioned delivery by truck into Monroe County, New York, and that was the only county that was mentioned in the license bulletin. Is it your understanding that you could deliver by truck at the same price and in the same quantities, into Genesee County? A. No, not if they specified Monroe County.

Q. In other words—

Justice Jackson: (Interposing) Are they con-
3832 tiguous counties, by the way?

Mr. Knuff: Yes, they are, as I understand it.

Justice Jackson: I just wanted to know.

By Mr. Knuff:

Q. In other words, the license bulletins, when they placed a definite price, and a definite limitation as to loads, and a definite area, precluded you from delivering at the same price and the same minimums, to any other area than that specified in the license bulletin?

Mr. Bromley: I object to that unless he calls for the witness' understanding.

Mr. Knuff: That is what I am asking for, as I recall.

Justice Stephens: Very well.

Justice Jackson: That is intended by the question.

Justice Stephens: Give your understanding as to the effect of the bulletins, as you dealt with them, in respect of the matter inquired about.

The Witness: In all of these bulletins they mentioned lists of counties in which we could make deliveries. We could quote and could sell into those counties mentioned, but if a certain place was not mentioned, if a certain county was not mentioned as being open for trucking deliveries, we could not establish it on our own account.

By Mr. Knuff:

Q. Now in Exhibit 412 you will notice at page 2
3833 that it says, "Hudson County, N. J.—all towns".
A. Yes.

Q. And for Middlesex County they list some towns. Do you notice that? A. Yes.

Justice Stephens: That is on page 2?

Mr. Knuff: Page 2, your Honor.

By Mr. Knuff:

Q. You say it is your understanding that you could ship into the unnamed towns in Middlesex County at the same price and the same minimums as you could ship into those named towns? A. That would be my interpretation.

Q. What would be the reason, if you know, for naming these specific towns? Why not say, "Middlesex County, New Jersey—all towns"? A. I don't know. Take Hudson County, for instance, that is practically all one city, Jersey City. So there would be very little point in covering it any other way.

Essex County is Newark and The Oranges, and very little else.

Union County is Elizabeth and a couple of other towns.

Then when you get out into the country, as a matter of convenience I think these others were listed.

But there never was any limitation that we could
3834 sell a town in Bergen County because it was listed and if there was a town next door to that, which didn't happen to be listed, that we could not sell that.

Q. That was your understanding? A. That was my understanding.

Q. I show you, Mr. Lenci, what has been marked for identification as Government's Exhibit 413, the same being a letter dated June 21, 1929, addressed to George N. Lenci, and signed by C. Henning, Vice President in Charge of Sales.

Did you receive that letter?

Justice Jackson: It is not in my file.

Mr. Knuff: I am sorry, I will see that you are furnished with a copy of that.

Justice Stephens: That is Exhibit 413?

Mr. Knuff: 413, your Honor.

In order to expedite the case, I am going to withdraw that exhibit.

By Mr. Knuff:

Q. I show you, Mr. Lenci, what has now been marked as Exhibit No. 413, the same being a letter dated June 26, 1929, addressed to George N. Lenci, and signed by C. Henning. Did you receive that letter, Mr. Lenci? A. Yes.

(The document referred to was marked as Government's Exhibit No. 413, for identification.)

3835 Mr. Knuff: We now offer in evidence Government's Exhibit No. 413.

Mr. Bromley: We make only the usual objection.

Justice Stephens: Received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 413 was received in evidence.)

By Mr. Knuff:

Q. What is the meaning of the penciled notation appearing at the top of that letter just under the address? A. Seconds and #2.

Q. Can you tell us what is meant by that? A. That is a memorandum I put on there calling attention to the fact that this was a change in the price of seconds and No. 2 board.

Q. Now you notice when you come down to 3/8-inch No. 2 grade gypsum wallboard, that the price changed from $18.75 per thousand square feet to $20 per thousand square feet?

Justice Jackson: I haven't that one either.

Mr. Knuff: I am sorry, your Honor, that you don't have it. I will furnish you a copy.

Justice Garrett: I have the letter which you de-
3836 scribe, but I can't find that item that you have just referred to.

Mr. Knuff: It is immediately following the list of towns listed on the first page.

Justice Garrett: Yes, I have found it now. Thank you.

Mr. Knuff: I now offer in evidence Government's Exhibit No. 413.

Mr. Bromley: We make the usual objection.

Justice Stephens: Received, subject to the usual reser-

vation with respect to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 413 was received in evidence on page 4129 of this transcript.)

Justice Stephens: That is quite a long exhibit, and if you are going to have a substantial amount of examination on that, we might as well take the noon recess at this time.

(Thereupon, at 12:15 o'clock p.m. a recess was taken until 1:45 o'clock p.m. of the same day.)

3837 AFTERNOON SESSION

(The trial was resumed at 1:45 o'clock p.m., pursuant to recess.)

Justice Stephens: Proceed, gentlemen.

Mr. Knuff: Judge Jackson, during the lunch hour I sent over to the Department, and I have obtained a negative photostat of Exhibit 413. We didn't have any more positives over there.

Justice Jackson: Well, in good business, particularly banking, there is always a "yes" window and a "no" window. I guess this is the "no" window. (Laughter.)

Thank you. What is the number of that again?

Mr. Knuff: Exhibit 413, Your Honor.

Justice Stephens: You may proceed.

Thereupon, GEORGE N. LENCI the witness on the stand at the time of recess, resumed his testimony as follows:

Direct Examination (resumed)

By Mr. Knuff:

Q. Mr. Lenci, I call your attention to the item on Exhibit 413 immediately following the basing points, that is, 3/8" #2 Grade Gypsum Wallboard—price changed from $18.75 per M sq. ft. to $20.00 per M sq. ft. Do you notice that? A. Yes, sir.

3838 Q. That is an increase in your #2 Grade Gypsum Wallboard of $2.50 over the original bulletin price of May 23, is it not? A. It is an increase of $1.25—not in our price, it is in the USG's price.

Q. That is what I say. It is an increase, is it not, of $2.50 over the May 23 price? A. Yes.

Q. And likewise, on your 3/8" Wallboard SECONDS, the price of $17.50 per M sq. ft. is an increase of $2.50 over the May 23 USG bulletin prices? A. That is right.

Q. I show you what has been marked for identification as Government's Exhibit 414, the same being a letter dated July 9, 1929, addressed to George N. Lenci, Vice President, and signed C. Henning, Vice President in Charge of Sales.

(The document referred to was marked as Government's Exhibit No. 414 for Identification.)

By Mr. Knuff:

Q. Did you receive that bulletin, Mr. Lenci? A. Yes.

Mr. Knuff: I now offer in evidence Government's Exhibit 414.

3839 Mr. Bromley: We make only the usual objection.

Justice Stephens: Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 414 was received in evidence.)

By Mr. Knuff:

Q. You will notice, Mr. Lenci, that in Government's Exhibit 414 no mention is made of No. 2 board in that bulletin? A. That is right.

Q. That means that a licensee who was manufacturing board would be unable to sell a No. 2 board, is that not correct?

Mr. Bromley: I object to that as incompetent because it calls for an interpretation of the bulletin, the interpretation in the question being obviously unsound.

Mr. Knuff: I think, if Your Honor pleases, that is proper cross examination.

Justice Stephens: I don't seem to be able to get counsel to understand the Court's view of that type of examination, Mr. Knuff. I have ruled twice, now, that while the rules permit you to lead, they do not permit you to cross examine as if this witness had been called on direct

3840 examination and is therefore a witness whose understanding might be gone into as bearing upon the meaning of his direct testimony. Whether the effect of these license bulletins was to prevent a particular item of conduct, I should think we would have to determine, as a matter of law, from the bulletins.

Mr. Knuff: I don't think that these bulletins are clear enough so that the Court can, without any further explanation, determine what they do mean.

Justice Stephens: The Court very carefully indicated to you yesterday or the day before that it does not assume or intend to restrict the Government from proving what was done or what was not done after receiving the bulletins. You are entitled to show that, of course, and if the bulletins are ambiguous it may well be that we will get to a point where the interpretation by conduct might be shown. That is a matter we might have to have argument upon before we made a ruling.

What is the question which is objected to?

(The pending question was read by the reporter.)

Justice Stephens: The defendants have not been objecting, this morning, to your examining this witness upon the understanding he had as to the requirements of the bulletins, but you don't even ask that in this question.

Mr. Knuff: I will rephrase my question, Your
3841 Honor. I accept that correction. I assumed that my question had included that. That is what I meant to convey by my question.

By Mr. Knuff:

Q. Mr. Lenci, you understood, did you not, by the bulletin of July 9, that when there was no quotation given for No. 2 board in that bulletin, that you would not be permitted to sell a No. 2 board? A. It was my understanding that this July 9 bulletin indicated that the price was established for a 3/8" wallboard, not specifying, any longer, a difference between No. 1 grade and No. 2 grade. That was my interpretation of it.

Q. If, at that time, you were manufacturing a No. 2 wallboard, and this bulletin had been issued, could you have continued to sell your No. 2 wallboard?

Mr. Bromley: That is the same question. I object to it on the same ground.

By Mr. Knuff:

Q. Is it your understanding that you could have continued to sell that wallboard? A. Well, we never made a No. 2 wallboard.

Q. I understand that. A. If we had, and had sold it, it would have to have been sold at this price in here, which represents the price of 3/8" wallboard, without classification.

Q. And heretofore, there had been a difference
3842 in price between the No. 1 wallboard and the No. 2 wallboard, is that correct? A. That is correct.

Q. And it is your understanding that if you had manufactured a No. 2 wallboard, you would have had to sell that No. 2 wallboard at the same price as for the No. 1 wallboard, is that correct? A. Yes.

Q. I show you, Mr. Lenci, what has been marked for Identification as Government's Exhibit 415, the same being a letter dated July 24, 1929, addressed to George N. Lenci, Vice President, and signed C. Henning, Vice President in Charge of Sales.

(The document referred to was marked as Government's Exhibit No. 415 for Identification.)

Mr. Knuff: I offer in evidence Government's Exhibit 415, Your Honor.

Mr. Bromley: We make the usual objection.

Justice Stephens: Did you ask him if he had received it?

Mr. Knuff: No, I say I am offering it now.

Justice Stephens: Did you ask the witness if he had received this letter?

Mr. Knuff: I beg your pardon, I guess I didn't.

3843 By Mr. Knuff:

Q. Mr. Lenci, did you receive this letter? A. Yes, I did.

Mr. Knuff: We now offer it in evidence.

Justice Stephens: The exhibit is received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 415, was received in evidence.)

By Mr. Knuff:

Q. Do you notice, Mr. Lenci, in the third paragraph, it says:

"$16.46 per M sq. ft. in 20-ton minimum cars.

"$15.91 per M sq. ft. in 30 or 40 ton minimum cars."

Do you notice that? A. Yes.

Q. What was the business reason for making a differential in price between a 20-ton and a 30 or 40-ton car, if you know? A. I know. At that time we were not doing business ourselves in the Chicago area, but I do know that a great

many Western railroads had one freight rate for a 20-ton car but a slightly lesser rate if the car was loaded to a heavier weight. Is that clear? In other words, the
3844 freight rate would be less on a 40-ton car, per ton, than it would be on a 20-ton car.

Q. Well, what has the freight rate to do with a differential in price, if you know? A. Well, these prices here represent a mill price plus freight or switching charge to these various destinations mentioned in these first four or five paragraphs.

Q. Well, your price was always a delivered price, was it not, the price that you quoted? A. Yes.

Q. Now then, what would the difference in freight rate have to do with the differential in the size of the car, per thousand feet? A. That is quite simple. If the material cost so much at the mill, and it cost a certain amount to deliver a 20-ton car to a certain destination, but a 40-ton car could be taken to that same destination at a lesser cost per ton; the corresponding delivered price would be less by the difference in the cost of transportation.

Q. Is it your understanding that the business reason was to try to equalize the delivery price so that a 20-ton car could be delivered at the same price as a 30-ton car? A. No. It is just the opposite. It was giving the customer the benefit of the lower price if he bought a larger quantity.

3845 Q. Well, is this $16.46 per thousand square feet a delivered price? A. Yes.

Q. That is a delivered price? A. Yes.

Justice Stephens: Let the Court understand that. How can that be unless it was known exactly what the freight rate was?

Justice Jackson: They evidently knew what the freight rate was, didn't they?

The Witness: They must have known what the freight rate was when they established this, and that probably represents an average to these various points in the Chicago suburbs.

Justice Stephens: I see.

The Witness: Can I make that clear for you?

By Mr. Knuff:

Q. It isn't clear to me. A. These prices are fairly arbitrary. I am not familiar with the exact prices, but suppose the price at the mill was $15.00, and the freight rate on a

20-ton car was $1.50 a thousand. That would be a price, delivered, of $16.50. But suppose the railroad says, "If you ship a 40-ton car we will give you a correspondingly lower freight rate, and your freight will only be $1.00
3846 a thousand." It would be $15.00 at the mill plus only $1.00, which would make $16.00 at destination, in return for the customer buying a larger quantity.

Justice Stephens: Those freight rates were sufficiently stable so that you could depend upon them as guiding your price on a delivered price basis?

The Witness: Yes, they were all I. C. C. published rates, and this represents probably the average to these points.

By Mr. Knuff:

Q. What do you mean by "average costs" within that area? I think you used the words "average cost". A. Yes.

Q. What do you mean by that? A. I didn't write these bulletins, you understand.

Mr. Bromley: He didn't say "average cost".

Justice Stephens: You mean average freight rate, do you not?

The Witness: Yes.

By Mr. Knuff:

Q. What do you mean by that? A. I didn't write these bulletins, as I say, and I am only speculating. I am trying to explain it to the Court.

Justice Stephens: Don't speculate about it if you don't know how these prices were figured out. I think it is
3847 clear now.

By Mr. Knuff:

Q. What do you mean by "average freight"? A. Let's use Washington as an example, to make it clear. Suppose Washington downtown had a rate of $1.25 to Bethesda, and $1.30 to Silver Spring, and $1.35 to Chevy Chase. The average of those would be $1.30. That would be the average rate which might well be established for deliveries to various suburban points around the center of Washington.

In other words, if you didn't do that you would have a dealer in Chevy Chase getting one price, and right next door you would have a dealer getting still a different price, and over at Silver Spring you would have a dealer getting another price. You have got to keep the people who are doing business in the same area, more or less on the same price basis.

Q. I see. And the purpose of this was to assure everybody in Chicago, whether he was on the North side of Chicago or the South side of Chicago, that they could get their board at the same price; is that correct? A. Yes, because they were all competing in the same little suburban towns.

Q. They were competing in what way, in price or
3848 in service? A. I am speaking now of the dealers.

Q. There was no price competition, was there? A. I am speaking of the customer; the dealer, who had to sell to the ultimate consumer, had to be able to buy at the same price as his next-door neighbor.

Q. I show you what has been marked for Identification as Government's Exhibit 416, the same being a letter of the United States Gypsum Company dated July 25, 1929, addressed to George N. Lenci, and signed C. Henning, Vice President in Charge of Sales.

(The document referred to was marked as Government's Exhibit No. 416 for Identification.)

By Mr. Knuff:

Q. Did you receive that letter? A. Yes.

Mr. Knuff: We offer in evidence, if Your Honor pleases, Government's Exhibit 416.

Mr. Bromley: We make the usual objection.

Justice Stephens: Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 416, was received in evidence.)

3849 By Mr. Knuff:

Q. On Exhibit 416, Mr. Lenci, do you see any price on that bulletin for Seconds? A. No, this appears to be only a plasterboard bulletin.

Q. Well, is there any price on there for Seconds of plasterboard? A. No.

Q. There never was a price for Seconds on plasterboard under the bulletins? A. I don't think there was, no.

3850 Q. I show you what has been marked for identification as Government's Exhibit 417, the same being a letter dated July 26, 1929, addressed to George N. Lenci, and signed by Mr. Henning.

(The document referred to was marked as Government's Exhibit No. 417, for identification.)

By Mr. Knuff:

Q. Did you receive that, Mr. Lenci? A. Yes.

Mr. Knuff: We now offer in evidence Government's Exhibit 417.

Mr. Bromley: We make the usual objection.

Justice Stephens: Received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 417 was received in evidence.)

By Mr. Knuff:

Q. The last paragraph of that letter reads:

"Plasterboard not delivered by our trucks to dealers warehouses. Please disregard the minimum price for delivery by truck given in our letter of July 25."

Can you explain what that means? A. That is a
3851 correction of the July 25th bulletin, of the second paragraph on the third page. That paragraph reads, "for truck deliveries to dealers warehouses". This letter of July 26th is apparently correcting that, by saying that plasterboard is not delivered by trucks to the dealers' warehouses. It is merely a correction in the wording of the previous bulletin.

Q. Is it your understanding that this meant there would be no truck deliveries to the dealers' warehouses out of Charlestown, Massachusetts? A. That is right.

Q. I show you Government's Exhibit 418, for identification, the same being dated August 3, 1929, addressed to George N. Lenci, and signed by Mr. Henning, Vice President in Charge of Sales.

(The document referred to was marked as Government's Exhibit No. 418, for identification.)

By Mr. Knuff:

Q. Did you receive that, Mr. Lenci?

Justice Garrett: Just a moment, please. The next one in order here is the one of July 31st.

Mr. Knuff: I am omitting that, your Honor.

Justice Garrett: You are not offering it?

Mr. Knuff: I am not identifying it or offering it.
3852 Justice Garrett: All right.

The Witness: Yes, I received that.

Mr. Knuff: I now offer in evidence, if your Honor please, Government's Exhibit 418 for identification.

Mr. Bromley: I make only the usual objection.

Justice Stephens: Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 418 was received in evidence.)

By Mr. Knuff:

Q. By this time, I take it, Mr. Lenci, the Ebsary Gypsum Company was making closed-edge wallboard and plasterboard, is that correct? A. I would say so, yes.

Q. And you had been making it for some little time prior to the receipt of this exhibit? A. I believe so, yes.

Q. Did you know when the Utzman patent expired? A. In August 1929, I forget the day.

Q. August 5th or 6th, 1929. And you received a bulletin from the licensor on August 3, 1929, is that correct? A. Yes.

Q. Now after August 6—

Justice Stephens: (Interposing) That is not
3853 exactly correct, is it? Did you receive it on August 3d, or was it dated August 3d?

The Witness: It was dated August 3d.

By Mr. Knuff:

Q. It was dated August 3d? A. Yes.

Q. And you received it within a day or two after that, would you say? A. Yes.

Q. Now then, did you ever receive a bulletin, after August 6, 1929, advising the Ebsary Gypsum Company that you were not required to follow the previous bulletins that were sent you? A. No.

Q. You never received such a letter? A. No.

Q. After August 6, 1929, you continued to sell board, and lath, at the same prices that you had sold it previous to August 6, did you not? A. To this extent. This was a transition period. We still were closing out our old materials and working ourselves up to the new basis. Without reference to some other records I could not say whether we were actually securing these prices, at this time, or not. You see what I mean? We had commitments, we had closed orders ahead.

3854 On your closed-edge board that you were selling after August 6th, did you observe bulletin prices?

Mr. Bromley: I object to that as incompetent, as assuming facts not in evidence. There weren't any bulletin prices after August 6. Every one of these notices is limited, in the opening paragraph, to the Utzman patent, and the contract specifically provided that there should be no right to fix prices after the expiration of this patent on August 6, 1929.

Justice Stephens: The objection is sustained. You may ask him what prices he charged after August 6, 1929, and you may ask the Court to compare them with the previously announced bulletin prices.

By Mr. Knuff:

Q. On your closed-edge board and on your closed-edge lath, did you comply with all the terms and conditions of the bulletins that were sent you prior to August 6, and on those products which were sold by you prior to August 6, 1929?

Mr. Bromley: I object to that as calling for a conclusion.

Justice Jackson: I wish you would break up that question a little bit, Mr. Knuff. It involves too many things.

Mr. Knuff: I will try to do that.

By Mr. Knuff:

Q. Mr. Lenci, I am referring now to the period prior to August 6, 1929. You understand that? A. Yes.

3855 Q. And I am also referring to closed-edge board. Do you understand that? A. Right.

Q. On your sales of closed-edge board, did you comply with the terms and conditions of the USG bulletins? A. Prior to August 6?

Q. That is right. A. I can't tell you, I don't know.

Q. You don't know? A. I don't know. I say that honestly because, like everyone in the business, we all had orders and contracts taken ahead, and we had to fulfill our prior obligations. Now whether we had cleaned up those obligations and gotten into these new prices, and were securing these new prices, or not, I cannot answer, I do not know.

Q. Those commitments you had were on open-edge board, were they not? A. We had to fill them with something.

Q. I am just referring, Mr. Lenci, to closed-edge board. A. I know that.

Q. Did you comply with all the terms and conditions of the USG bulletins that were issued prior to August 6, 1929?

Mr. Bromley: He has answered that and said that he can't possibly tell. I object to it as repetitious.

3856 Justice Stephens: Sustained. You are not foreclosed from asking what terms and conditions he did sell on, if he knows.

By Mr. Knuff:

Q. Did you comply with any of the USG price bulletins on closed-edge board prior to August 6th? A. We probably made some sales on the higher basis, but we had a great many that we had to clean up at older and lower prices.

Q. Now what are you referring to when you say you had to "clean up"; are you referring to open-edge or closed-edge board? A. We had orders for board—

Q. (Interposing) What kind of board? A. Any kind of board; and if we couldn't fill them with open-edge board, our customers expected us to make deliveries and we had to make deliveries with whatever board we had, and that towards the last, up near this period, was closed-edge board. We moved from one type of board to another in completing these orders. So I can't honestly say that we were fulfilling the terms of these bulletins in full.

Q. You probably were complying with some of those bulletins as to some of the orders, is that correct? A. That is quite possible.

3857 Q. And after August 6, 1929, did the Ebsary Gypsum Company change its sales policy on closed-edge board? A. No.

Q. Do you know if other licensees, after August 6, 1929, sold board at the same price that they had sold it prior to August 6?

Mr. Bromley: That calls for a "yes" or "no" answer.

Justice Stephens: Do you know about that?

The Witness: I don't know that, no, sir.

By Mr. Knuff:

Q. If they had sold it, would you have known?

Mr. Bromley: I object to that as speculative.

Mr. Knuff: I think it was brought out very clearly by Mr. Higgins that this is a very competitive industry, and the minute there was a change in price it was known throughout the industry.

By Mr. Knuff:

Q. Isn't that true, Mr. Lenci? A. Yes, but you must remember—

Justice Stephens: (Interposing) Yet it is a speculative question. The objection is sustained.

By Mr. Knuff:

Q. Did you have any trade information that after August 6, 1929, there was any difference in price policy in the industry than there was before August 6th, with reference to closed-edge board and lath? A. I don't remember.

3858 Q. You don't remember? A. No.

Q. Prior to May 22, 1929, the board situation was in a demoralized condition, I believe you have testified. A. It was in a very bad condition.

Q. Now after August 6, 1929, did the industry return to that condition? A. No.

Q. I show you what has been marked for identification as Government's Exhibit 419, the same being a typewritten sheet of paper headed, "June 6th Discussion."

(The document referred to was marked as Government's Exhibit No. 419, for identification.)

By Mr. Knuff:

Q. Will you look at that, Mr. Lenci?

Justice Stephens: Have we that before us?

Mr. Knuff: You should have that, your Honor.

Justice Jackson: Is it this paper that has a lot of numbered sentences on it?

Mr. Knuff: That is right, your Honor.

Justice Jackson: There is no date on mine.

Mr. Knuff: The date is probably under the clip at the top.

By Mr. Knuff:

3859 Q. The paper that you have before you, Mr. Lenci, was prepared by you, was it not? A. Yes.

Q. And it was prepared after you had attended a meeting in Chicago on the 6th of June, 1929, is that correct? A. Yes.

Q. And it was prepared a few days after that meeting, is that correct? A. Yes.

Mr. Knuff: We offer in evidence, if your Honor pleases, Government's Exhibit 419.

Mr. Bromley: I object to it as incompetent. I am not sure what it is, yet. It seems to me that no proper foundation has been laid for it.

Justice Stephens: We don't understand what it means, Mr. Knuff, and unless we do we cannot very well tell whether it has any bearing on the issues in this case. Can you have it explained a little further?

Mr. Knuff: Yes, I can have it explained.

By Mr. Knuff:

Q. Mr: Lenci, the paper that you have before you purports to contain notes of a meeting that you attended in Chicago on the 6th of June, 1929, does it not? A. Yes.

Q. And these are notes of the discussion that was
3860 had at that meeting, is that correct? A. Yes.

Q. And you attended that meeting? A. Yes.

Q. And you prepared the notes shortly after that meeting was held, is that correct? A. Yes.

Mr. Knuff: I think, if your Honor pleases, that it is now properly identified.

Mr. Bromley: I don't understand that these notes would be competent in the absence of an attempt to develop from the witness what happened at the meeting.

Justice Stephens: You don't show what the meeting was, and who was at the meeting. For all we know, it might have been a meeting of the Board of Directors of the Elks. (Laughter.)

What was the meeting, and who was there? You can perhaps tell us that informally.

Mr. Knuff: All right. I was under the impression that I could refer to the items—

Justice Stephens: (Interposing) Ordinarily that is true, but there are exceptions. We cannot rule upon exhibits as to their materiality and competency unless we know what they mean, and as to competency here, we can't tell yet whether this is offered to refresh his recollection,
3861 or as past recollection recorded, and if so, what—and until the word "what" is explained, we don't know whether it is relevant to any issue in the case.

Of course there are words on it which indicate that it has some relevancy, some relationship to the issues in the case, at least. It refers to "board" and "bubble board", and other things that we have heard of before.

We will permit you to examine the witness on this a little further, subject to a motion to strike if you do not develop that it is competent and material—in order that we may understand what it is.

By Mr. Knuff:

Q. There are sixteen items on this exhibit, are there not, Mr. Lenci? A. Yes.

Q. And they represent sixteen topics that were discussed at the meeting of June 6, 1929, which you attended, do they not? A. Yes.

Q. Who was present at that meeting that you can recall? A. I don't remember the individuals, but I think most of the licensee companies were represented.

Q. Was the United States Gypsum Company represented at that meeting of June 6? A. Yes.

3862 Q. Who attended for United States Gypsum Company, Mr. Avery, or Mr. MacLeish, or both? A. I don't really remember who attended for them. I know that Mr. Henning attended.

Q. Was Certain-teed represented there? A. I think so.

Q. Was National represented there? A. I think so.

Q. And of course you were present. A. Yes.

Q. And who else was present for Ebsary? A. I don't know whether anyone else was present at that meeting, or not. I have no record here to refresh my memory.

Q. Was any person there representing the Kelley Plasterboard Company? A. I don't think so.

Q. Was there anybody representing Atlantic Gypsum Company, present? A. I believe there was.

Q. That was Mr. Neale? A. It probably was Mr. Neale.

Q. When you say "probably", do you mean that that is your best recollection? A. Yes, I believe Mr. Neale was there.

Q. Was Mr. Channing there? A. I don't know, I
3863 don't remember.

Q. Was Texas Cement Plaster Company represented there at the meeting? A. I don't remember. I would say that Mr. Chism attended one of the early meetings, but I do not remember whether it was this individual meeting or not.

Q. Where was this meeting held? A. In Chicago.

Q. At the Palmer House in Chicago? A. I think so, I think so.

Q. On May 22nd and 23rd, 1929, when you were in Chicago, and at the time Ebsary signed the license agreement, was June 6 fixed as the date for a meeting of the licensees? A. I don't recall.

Q. Who called the meeting of June 6th? A. Charlie Henning—Mr. Henning.

Q. And what did he tell you the purpose of this meeting was? A. I don't remember that.

Q. How did he notify you that there was going to be a meeting held on the 6th of June? A. Well, sometimes we would get a telephone call, or a telegram, or a letter. It might come in either way.

Q. You don't know whether you received a telephone call, or a telegram, or a letter from Mr. Henning?

3864 A. No, I don't recall.

Q. But you know it was Mr. Henning that conveyed the information to you that there would be a meeting on the 6th of June, 1929? A. Yes, he acted as the chairman, and he was the usual one who called the meetings, in fact he always called the meetings.

Q. And do you recall what information was conveyed to you as to who would be present at that meeting? A. As to the few notices which I do remember getting, the letter would simply say, "There will be a meeting of the licensees" on such-and-such a date at such-and-such an address, and no agenda was given, or anything of that kind.

Q. You don't recall, Mr. Lenci, if I understand you correctly, whether or not you received a telephone call, or a telegram, or a letter advising you that a meeting was going to be held? A. That is right.

Q. But you did go to Chicago on the 6th of June? A. Yes.

Q. And you attended a meeting there? A. Yes.

Q. And the various companies that you have mentioned attended that meeting also? A. Yes.

3865 Q. Now what was discussed at that meeting? A. Well the first thing mentioned on this memorandum is bubble board contracts and—

Justice Stephens: (Interposing) Don't read from the memorandum. You were asked what was discussed at the meeting. If you remember yourself, tell us from your own memory.

The Witness: I was using this purely as a reminder.

Justice Stephens: That is all right. Have you no independent recollection of what took place at the meeting, without that memorandum?

The Witness: Not completely, no. I would have as to one or two of the items.

Justice Stephens: And this proposed Exhibit 419 does refresh your recollection as to what took place?

The Witness: Yes.

By Mr. Knuff:

Q. Will you state what did take place at that meeting of June 6th, with reference to bubble board? A. At the June 6th meeting Mr. Henning asked us to be sure to have our lawyers check up on the bubble board contracts which had been, as I recall it, submitted just prior to this time.

You see—going back to the May meeting—Mr. Avery told us about the bubble board invention or patents, rather—.

Q. (Interposing) Did he tell you that at the May
3866 meeting or at the June meeting? A. At the May meeting. And following that meeting there were contracts, as I recall it, mailed to the various licensees, to be submitted to our attorneys, for them to check. Mr. Henning asked us to please get after our counsel to look over these licenses, these proposed licenses, and to send them in or make comments upon them.

Q. You say that Mr. Henning told you to get after your attorneys to have them check over these agreements, is that correct? A. Yes.

Q. What was Mr. Henning's hurry about that, do you know? A. I don't know.

Q. You don't? A. No.

Q. At the meeting where Mr. Avery told you about this bubble board arrangement, do you recall that Mr. Avery stated to you that he had been in Europe a few months previous for the purpose of purchasing ships to haul gypsum from Nova Scotia to the United States, and while he was in Europe he had contacted the inventor or the owners of the Bayer patent, and that he had found out from the owners or the inventor that the United States was going to be thrown open for the use of their patent in two respects: One, as to gypsum; and two, as to cement; and that Mr. Avery had received the American rights
3867 for the gypsum business. Do you recall that? A. I recall the greater part of it. I don't remember his reason for going to Europe to buy a ship, I don't remember anything about that part of it. But I do recall what he said about the Bayer patent being thrown open for use in the United States for cement and gypsum, and Mr. Avery said he had secured the rights to use the Bayer patent in gypsum. I do remember that.

Q. Do you recall that Mr. Avery told you that the reason why he had secured the rights for the Bayer patent was because Mr. Roos had an application in the Patent Office

for a patent, and that there was an interference proceedings in the Patent Office between Mr. Roos and Mr. Bayer? Do you recall that? A. I don't remember all of that. I do remember that there was a Roos application. I don't remember whether Mr. Avery explained that or not.

Q. You are not sure of that? A. No.

Q. Now the so-called American application for the bubble process was known as the Roos application, is that correct? A. That is, the American applicant was Mr. Roos.

Q. Carlisle K. Roos? A. I don't know his first name.

Q. He was connected with the United States
3868 Gypsum Company? A. I believe so, yes.

Q. Did Mr. Avery at that time, that is at the May meeting, explain the advantages of the Roos process? A. I don't remember that he differentiated between the Roos and the Bayer processes. He did speak on the advantages of the bubble system, as we have always called it.

Q. And what were the advantages that Mr. Avery spoke of? A. Well, the great advantage was the saving in weight.

Q. Did he specify as to how much weight could be saved by the use of the so-called bubble board process? A. I don't know that he put it in figures, but we realized it was quite a large amount. We could understand from his explanation that a lot of this dense matter in the board would be supplanted by these bubbles, and the board's strength would not be lessened at all, but it would reduce the weight.

Q. And Mr. Avery explained all that to you at this May meeting? A. Yes, at the May meeting.

Q. That is your recollection on that? A. Yes.

Q. And subsequent to that, the United States Gypsum Company had sent you and the other licensees a license agreement covering the use of the bubble process,
3869 is that right? A. It is my recollection that that was sent between the May meeting and the June meeting, which was the reason for the memorandum here that the bubble board contracts were to be considered by various counsel.

Q. So that when you got to Chicago on the 6th of June, Mr. Henning called your attention to the fact that the licensees had received a tentative draft of the bubble license, and Mr. Henning asked you, and asked all the rest of the gentlemen who were present, to have their attorneys hurry up and check into that application, is that correct?

Mr. Bromley: I don't think he said anything about hurrying up in his answer.

Justice Stephens: The witness did not use the words "hurrying up". That is not a correct statement of his answer. But you may ask him what was said.

The Witness: I am sorry Mr. Bromley said that because I was going to say the same thing, and I wouldn't want you to think that he led me, because I don't recall that he hurried us.

Mr. Bromley: I withdraw the objection.

By Mr. Knuff:

Q. What did he say? A. He simply mentioned that they had been sent out—I think they were sent directly to counsel and not to the companies—and for us to see whether they were going to go through or not.

3870 Q. Now at that meeting on the 6th of June, was there any discussion as to whether or not the American Gypsum Company would be offered a license similar to the license that Ebsary had signed in May? A. Yes, it is my recollection—may I refer to this to refresh my recollection?

Justice Stephens: If it refreshes your recollection you may do so. He wants your best recollection, but there is no objection to your using that to refresh your recollection.

The Witness: I don't want you to think I have an artificially good memory, because I haven't, but this does refresh my memory.

Justice Stephens: Very well.

The Witness: It was stated at the meeting that American hadn't taken a license, but that they would later.

By Mr. Knuff:

Q. Who said that, if you recall? A. My recollection is that Mr. Henning made the statement, but I am not sure.

Q. Did any of the other persons present make any comment as to whether or not it was desirable for American to become a licensee? A. I don't recall.

Q. You don't recall that? A. No.

3871 Q. What was your own attitude on that, or the attitude of your company? A. We were not too directly interested, because we operated in different areas. We did not overlap.

Q. So it didn't make any difference to you whether or not American did become a licensee? A. Not too much, no.

Q. Now at that meeting on June 6th, was the question of jobbers in the industry discussed? A. Yes.

Q. Who discussed that? A. Mr. Henning.

Q. What did he say about it? A. He asked all the licensees to send to him a list of the companies they were selling as jobbers.

Q. And did he say anything else other than for you to send the list? A. I don't recall. The idea was to see how many of them there were.

Q. Did Mr. Henning at that time state that the United States Gypsum Company did not market their products through jobbers, their gypsum products? A. I don't remember.

Q. You don't recall that? A. I don't recall that.

3872 Q. Did any of the licensees make any comment as to jobbers at that time? A. I don't recall that.

Q. You don't have any recollection at all about it? A. I have no recollection.

Q. But you do know that Mr. Henning made the suggestion that all the licensees were to send in a list of their jobbers? A. Yes.

Q. Or was it just your company, which? A. I think they were all asked.

Q. They were all asked, that is your recollection? A. That is my recollection, yes.

Q. Now you have noted on this exhibit, "Dealer Distributors—send list." What do you mean by that? A. I am sorry now but I could not tell you at this late date what the difference was between a dealer distributor and a jobber.

Q. You haven't any recollection? A. I don't really know.

Q. You haven't any recollection as to the meaning of that item on this list?

Justice Stephens: Well, the question strictly speaking is whether that item on the list refreshes his recollection. This isn't in evidence. But you can ask him directly, of course, since he is an experienced businessman,

3873 about those distinctions, if he wishes to adventure upon them.

Mr. Knuff: I am only asking him as to his recollection of the things that are on this list.

Justice Stephens: Well, I think—and I say this only in the interest of saving time—that the list should be used.

to refresh his recollection, and not his recollection used to identify the list. Perhaps we mean the same thing. I thought the witness understood that he was entirely free to testify as to what he recollected, independently of this, and he is entirely free to consult this list, which has been marked Exhibit 419 for identification if it refreshes his recollection, and if it does, he may testify to his refreshed recollection. But this isn't in evidence yet, and therefore he could not testify as to what the list means. That is what you last asked him, with respect to one item.

Mr. Knuff: Probably your Honor is correct. I didn't mean to do that.

Justice Stephens: Thank you. Proceed.

By Mr. Knuff:

Q. At the meeting of June 6, 1929, was there any discussion concerning manufacturers and carload and less-than-carload manufacturers? A. Well, if there was, I cannot remember now what it was.

Q. Was there any discussion at the meeting of June 6 concerning mail-order houses as an outlet for gypsum
3874 products? A. Yes, I do remember that.

Q. I believe you brought that up yourself, did you not? A. I may have.

Q. What is your recollection concerning that, Mr. Lenci? A. Well, there was a question as to whether the large mail-order houses should be sold at a cheaper price than the builders' supply yards in their same towns, and I believe the custom in the past had been to sell them at a 10 per cent discount below the usual dealers' price in each particular town. We thought that was not quite right, that they should not have the advantage over the outfit with its own yard.

Q. What is that again? A. That they should not have the advantage over the builders' supply yard in the same town.

Q. In other words, you brought up the question as to whether or not the mail-order house should have a price advantage over the building supply dealer, is that correct? A. That is correct.

Q. And it was your thought that the mail-order house should not be sold on any more favorable basis than the building supply dealer, is that correct? A. That is correct, yes.

Q. And whom did you make that statement to, or did you make any such statement at the meeting, let me put

it that way? A. I don't know whether I started it or
3875 whether someone else spoke about it, but I believe I expressed my views along the same lines as I have just now.

Q. Did you specifically ask whether Mr. Avery was selling to Montgomery, Ward & Company at that time? A. I don't know.

Q. You don't recall that? A. No.

Q. You knew at that time that Mr. Avery was on the Board of Directors of Montgomery, Ward & Company, did you not? A. I don't know just when his connection did start. I know that he has been, for a number of years, but whether it went back as far as 1929 or not, I don't remember.

Q. Wasn't it your thought that if United States Gypsum Company was selling to Montgomery, Ward & Company, the other dealers should be in a position to sell to Sears, Roebuck & Company? A. Well, no, I think we were looking to protect the local dealer.

Q. You were entirely against favoring the— A. (Interposing) The mail-order house.

Q. The mail-order house? A. Yes.

Q. And you so expressed yourself at the meeting? A. Yes.

Q. Did any other persons express themselves at
3876 that meeting, also, in that respect? A. I have really forgotten now, but I believe some of them did.

Q. But you can't tell us now who did? A. No.

Q. At the meeting of June 6th, was there any discussion concerning the price at which gypsum products should be sold to house wreckers? A. Yes.

Q. Your use of the words "house wrecker" is synonymous with the term "bathtub yard", is it not? A. Yes, they are practically the same thing.

Q. Just what is a bathtub yard? A. Well, a bathtub yard, or a house wrecker, is a dealer that sets up to buy second-hand material from buildings that are wrecked, or in some cases he may do the wrecking himself. That gives him a nucleus of second-hand lumber and second-hand plumbing equipment. With that as a basis, he calls himself a dealer and puts in a line of other new materials, and they were known throughout the trade as house wreckers or bathtub yards.

The question came up as to whether they were considered dealers or not, and they are dealers, and were so considered.

Q. And that was discussed at the meeting of June 6? A. Yes.

3877 Q. And at that meeting what position did you take on that? A. I don't remember whether I took any position on it or not. I can't remember it, but I do remember it was discussed, and if I took any position it would be that they were dealers.

Q. These so-called bathtub yards are quite numerous in the State of New Jersey, are they not? A. There are plenty of them, but there are not as many as there were.

Q. Now was there any discussion as to whether these bathtub yards should be sold at dealer prices, or not? A. No, the question was as to whether they were to be recognized as dealers.

Q. And was there any decision made at that time? A. And they were, yes.

Q. And who made that decision? A. Mr. Henning.

Q. Mr. Henning? A. We didn't make decisions.

Q. And what did Mr. Henning tell you about that, that the USG would recognize these wreckers or bathtub yards as dealers? A. Yes.

Q. And that they could be sold on a dealer basis?

3878 A. Yes.

Justice Stephens: We will take the afternoon recess.

(Thereupon, a short recess was taken, after which the trial was resumed.)

3879 Justice Stephens: Proceed.

By Mr. Knuff:

Q. At the June 6 meeting that we have been previously discussing, was there any discussion concerning the price which the Government was to be charged for gypsum board and lath? A. Yes, there was.

Q. What was that discussion? A. The discussion was that on any direct sales to the Government departments, they were to have the benefit of the dealer's price.

Q. And do you recall who participated in that discussion? A. I don't know whether it was a discussion or a statement by Mr. Henning. I don't think it was a discussion, I think it was merely a statement which he made.

Q. Do you recall whether any of the persons in attendance at the meeting commented on Mr. Henning's statement? A. I don't remember what the comments were, but I believe everybody felt that was the right thing to do.

Q. Everybody felt that it was all right to sell the Government gypsum board and gypsum lath at— A. (Inter-

posing) Yes. You see, at that time the Treasury Department was purchasing, and to a certain small extent
3880 the Army, and on direct purchases we felt they were entitled to the lowest price.

Q. And by "direct purchases", what do you mean? A. When they placed orders with any of the gypsum board producers.

Q. Like National or Certain-teed or yourself? A. Yes.

Q. Any of the people that were manufacturing gypsum board, you felt it was perfectly all right for the Government to buy that board directly from the manufacturer? A. Yes.

Q. And it didn't necessarily have to go through a dealer? A. That is right.

Q. And that the price the Government would get would be the dealer price? A. That is right.

Q. And Mr. Henning told you that that would be done? A. He told us that that was to be what was done.

Q. And you all agreed that that was the fair and right thing to do? A. We didn't agree that it was, but we felt that it was.

Q. At the meeting of June 6, was there any discussion concerning whether or not there should be a differ-
3881 ential on the purchases of wallboard when it was picked up by a truck at a mill or at a warehouse? A. I believe there was. I believe the statement was made that it cost more at the mill, for instance, when a customer's truck backed in to be loaded with a small quantity of material, than would be the case in our usual course of business to take the material right from our kilns to the boxcar and load the cars.

Q. Do you recall who made that statement? A. No, I don't.

Justice Stephens: Will you please read that answer? I didn't understand it.

(The answer was read by the reporter.)

By Mr. Knuff:

Q. Now when you say it cost more, you meant by that, Mr. Lenci, did you not, that you could handle a large order for gypsum board or gypsum lath cheaper than you could handle an order for, we will say, a thousand square feet? A. Yes.

Q. In other words, if a man came in and bought 1,000 square feet of gypsum board, and there were 30 such customers, it cost you more to handle that 30,000 square feet

of gypsum board than it would cost you to handle 30,000 feet sold to one customer? A. That is right.

3882 Q. And that would be because of the amount of the bookkeeping involved, and the additional service, and so forth? A. Yes.

Q. And you felt that on these small purchases at the mill, or it was felt, rather, that there should be a differential over and above the price that you would get for quantity purchases? A. That is right.

Q. What had been the practice of your company before that? Did you sell a thousand square feet of board at the same price that you would have sold 30,000 square feet of board, before, that is, at the same unit price? A. I don't really remember.

Q. You don't recall what the practice was? A. No.

Q. Do you recall what the practice of the industry was? A. No, I don't.

Q. When you put wallboard on the studding, the joints between the two boards, as a general rule, are imperfect, or not perfect; is that correct? If you take two pieces of wallboard and put them on the studding like this (indicating), the joint is not a perfect joint, is that correct? A. No, there is a visible joint there.

3883 And in order to get that joint to a certain degree of perfection, you fill that crack in there with so-called finisher, is that correct? A. We call it joint filler.

Q. Joint filler? A. Yes.

Q. Now at the June 6 meeting, was there any discussion as to this filler? A. I believe there was. There had been a badly abused custom of giving away filler, which in a way was a rebate, they would give any quantity of filler.

Q. You say there had been a custom in the gypsum industry to supply filler on an order of wallboard, is that correct? A. In some cases, yes.

Q. And that filler was supplied free of charge, is that correct? A. It sometimes was charged for and at other times given away.

Q. And you say that that custom of either selling it or else giving it away, had been prevalent in the gypsum industry for some time, is that correct? A. Yes, as I recall it.

Q. Was there any discussion as to the advisability of discontinuing the giving away of filler with board or-

3884 ders? A. I don't know whether it was a discussion or whether it was a statement made by Mr. Henning

that a gift of filler would be considered a rebate. It was more in that light.

Q. Was there any general discussion concerning that? A. I don't think so.

Q. You don't believe there was any discussion about that? A. I don't think so.

Q. At the June 6 meeting, was there any discussion as to the amount of protected board that USG had on hand? A. Yes.

Q. Now what do you mean by the term "protected board"? A. Well, all of the companies had orders booked ahead. I mean, that is the usual way of doing business. Your dealer would buy, at that time, not for a specific job but he would buy 400,000 feet or 500,000 feet at a fixed price—

Q. (Interposing) For future delivery? A. Yes, so he would know what that was going to cost him.

Q. Yes. A. And we were all caught with these unfilled orders on our hands. And Mr. Henning, I remember, said that their company alone had 3 million feet for which they were obligated at lower prices, which was a business obligation that would have to be fulfilled. We had the same
3885 thing, on a smaller scale, and I imagine the other companies had.

Q. In other words, the dealer in gypsum board or gypsum lath might order 50,000 feet of board today, from a producing company, for future delivery; is that correct? A. Well, at that time there were two or three dealers around New York, and I think the same thing existed in other large cities—we had one particular dealer who would buy in 500,000 foot lots. He would place an order for a half a million feet to be delivered on call, and when we signed the license agreement we had several of these orders on our books; and that was the reason this morning, when you were asking me if we secured the high price immediately, I had to say no, because these orders ran along for a period of months.

That brings up the next question, that before these orders were completed we ran out of open-edge board and had to complete the low-price orders with the board which we were making at that time, which was a closed-edge board. That ran over a period of maybe 3 or 4 months.

Q. In other words, you explained to Mr. Henning that you had orders on hand for a considerable amount of open-edge board for delivery, is that correct? A. Yes.

Q. And that you didn't have the open-edge board to deliver to cover those orders? A. Yes.

3886 Q. And you asked Mr. Henning if you could sell closed-edge board to take care of your open-edge board commitments, is that right? A. That is right.

Q. What did Mr. Henning tell you? A. He said that that was all right.

Q. Now on this protected board question, when a dealer buys board for future delivery, what was the custom as to the maximum time at which delivery could be made? A. Well, I think those delivery dates were very loose.

Q. Well, now, what do you mean by "loose"? A. I mean that at that time—you are getting into 1929 and 1930—if an order was offered to us, we would take it and be glad to have it on our books, knowing that eventually it would be filled. In other words, we were not too tight with our final delivery dates.

Q. In other words, if somebody came in and ordered 10,000 feet of board from you, to be delivered on demand, you would take the order; is that correct? A. Well, 10,000 feet is—

Q. (Interposing) A small order? A. It is only a part of a carload. But the usual way is that the dealer would
3887 say, "Well, I am figuring on such-and-such a job, which will need a certain quantity of board. I am placing my order with you for this material." That job might not be completed for 2 or 3 or 4 months, and he was protected with us, and he knew that his board was going to cost him so much. That is what this protected board item is.

Q. To make this specific, on the Pentagon Building down here, when the contractor took the job to construct that Pentagon Building, in order to protect himself he placed with the manufacturer an order for so many million feet of gypsum board—would that be correct? A. He bought some gypsum board, yes.

Q. And it may have been a year before that gypsum board would have been used; is that correct? A. Yes.

Q. And in the meantime, if prices went down, would he be given the advantage of the decline in that price? A. He would take it.

Q. He would take it? A. He would take it. The customer is always right.

Q. But if prices went up, the manufacturer was obligated to sell at the price that the dealer contracted for? A. That is right.

Q. And is that the discussion that was held out in
3888 Chicago on the 6th of June? A. No, that is slightly different.

Q. What was the discussion out there? A. The discussion out there was that these orders were to be filled at the price at which they were booked. It didn't go into the question of whether, if the price went down, then the contractor was going to buy it at a less price, or anything of that kind. It wasn't as full as that.

Q. Was there any discussion as to the length of time you would be permitted to protect a contractor on his purchases? A. I don't remember any.

Q. You don't recall any? A. I don't recall any at all.

Q. Was there a bulletin ever issued concerning that? A. I think much later on there was. In fact, I am quite sure there was.

Q. By "much later on", do you mean a year or two years? A. I would say probably 2 or 3 years later.

Q. Two or three years later? A. Yes. The later bulletins, I think, provided that—I am not sure of the language—but the idea was that only on specific jobs could orders be booked ahead, and that we couldn't take orders for unlimited quantities unless some particular building was involved.

3889 Now at your meeting on June 6, did you have any discussion concerning the patent markings that you would put on the board? A. No, that wasn't a discussion. I remember that quite well, because we were new in the business, and we didn't know how to mark our board, and I saw Mr. Henning in his office and asked where to buy labels similar to those that they were using at that time, which contained the patent numbers, and he gave me the address of a label printing house in Chicago that I visited that same afternoon, and I placed an order for labels.

Q. Then at the meeting of June 6, there was no general discussion concerning— A. (Interposing) That wasn't a general discussion, that was something I took up with him personally.

Q. At the June 6th meeting, was there any discussion as to what the price of No. 1 gypsum board was going to be on the 7th of June? A. No, this memorandum—I beg your pardon, I can't refer to that.

Justice Stephens: You can use it to refresh your recollection. But answer the question, if there was any such discussion, if you do remember such discussion.

The Witness: No, I don't remember.

By Mr. Knuff:

3890 Q. There wasn't any discussion as to the price that was to be made the following day? A. I don't think so.

Q. Was there a price change made the following day? A. I think there was.

Q. On No. 1 board or No. 2 board, or on both? A. Well, I haven't got the exhibit here before me. I think I had it this morning.

Mr. Knuff: May I have Exhibit 410, please?

(Exhibit 410 handed to the witness.)

Justice Stephens: Of course, the Court does not forbid you to use parts of this exhibit as past recollection recorded if there is any part which is the record of a past recollection. But I suppose you can clear this up by looking at these bulletins, can't you?

Mr. Knuff: That is the reason I asked for Exhibit 410, and I am going to ask him to refer to that.

Justice Stephens: Go ahead.

By Mr. Knuff:

Q. Do you have that exhibit before you? A. I have it, yes.

Q. Now on June 7, was there a price change? A. There was on June 7, yes.

Q. And what item was changed? A. That was the 3891 change in the price of No. 2 board and Seconds.

Q. Was it an increase or a decrease in price? A. It was an increase.

Q. No. 2 board was increased from what to what? A. No. 2 was increased from $17.50 to $18.75 per thousand square feet.

Q. And your Seconds were increased from what to what? A. From $15.00 to $16.25 per thousand square feet.

Q. Did the price of lath remain the same? A. Yes.

In order to clear up the record, it may be that this was handed us as we left, I am not certain.

Q. When you say "this", you have reference to Exhibit 410? A. Exhibit 410. It may have been handed to us, although I do not remember that circumstance.

Q. This morning, I understood you to say that you received it through the mail. A. That is what I thought, because it is dated a day later, and I don't think it was handed to us. You see, my memorandum was made up

after I got home, and it may have included this information which I would have gotten by the time I got back to New York.

Q. Was there anything said at the meeting of June 6 with reference to when another meeting was going
3892 to be held, of the licensees? A. Yes.

Q. When was the next meeting going to be held? A. June 26.

Q. At the June 6th discussion was there anything brought up about the Hite and Haggerty patents, do you recall? A. I don't think so, I don't remember that at all.

Q. Do you know what I mean by the so-called Hite and Haggerty patents? A. Yes.

Q. The Haggerty patent is the patent that has starch in it? A. That is correct.

Q. And you have no recollection of a discussion at the June 6 meeting concerning the Hite and Haggerty patents? A. No.

Mr. Knuff: If Your Honors please, we now offer in evidence Government's Exhibit 419. This is a memorandum made by the witness from the meeting that was held in Chicago on June 6, 1929, and as I understand this witness he made this memorandum himself and it purports to give a resume of the matters that were discussed at that meeting.

Justice Stephens: Have you any objection?

Mr. Bromley: Do I understand it is only being
3893 introduced because it was used to refresh recollection?

Mr. Knuff: It is being introduced for several purposes. One is that it is past recollection recorded; and, second, it is offered as a declaration of a co-conspirator.

Mr. Bromley: Well, I object to it, if that is the ground of the offer. Since it has been used to refresh recollection, I suppose it could be offered and received on that ground, but on that ground only.

Justice Stephens: Well, the Court has always been of the view, Mr. Bromley, that items which are used to refresh recollection, while they may be exhibited to the witness, and should be exhibited to counsel and the Court so that there may be a determination of whether or not they could reasonably be used to refresh recollection, are not themselves evidence, and are therefore not admissible.

Mr. Bromley: Well, I object to it on that ground, then.

Justice Stephens: But past recollection recorded is another thing. If the witness has forgotten the transaction, but at the time of it made a statement of what took place

at the transaction and can now testify that it is a correct statement of what took place at the transaction, then under the doctrine of past recollection recorded it can come in itself. But this witness has given full testimony as to what did take place in this meeting of June 6, and
3894 therefore there is no need of having it in as past recollection recorded.

So far as it being a declaration is concerned, it is no different as a declaration from the statement he has made, which is more extended.

Why do you need this?

Mr. Knuff: Well, I certainly think that this exhibit, as an exhibit, is certainly corroborative. I think it is a declaration, and for that purpose I would like to have it in the record.

Justice Stephens: We are all three of the view that it is not admissible in evidence as evidence, and it is excluded.

The declarations which you claim it to be have really been made by this witness himself in his description of the conversation. And it isn't an intelligible declaration, as such, it is simply an itemization of points which were discussed at this meeting; and the witness has stated that it does refresh his recollection.

But as I have stated, it isn't necessary as past recollection recorded, because the witness has a present memory. So it is excluded from evidence and not received.

Mr. Knuff: I don't know, but possibly we are going to have quite a considerable number of declarations of this kind.

3895 Justice Jackson: We will rule on them as they occur.

Mr. Knuff: Very well.

By Mr. Knuff:

Q. I show you, Mr. Lenci, Government's Exhibit 420, the same being a letter dated June 21, 1929, addressed to Mr. H. W. Rippey, Powers Building, Rochester, New York, signed George N. Lenci, Vice President.

(The document referred to was marked as Government's Exhibit No. 420 for Identification.)

By Mr. Knuff:

Q. Do you recognize that, Mr. Lenci, as a copy of a letter that you sent to Mr. H. W. Rippey? A. Yes.

Mr. Knuff: I offer in evidence Government's Exhibit 420.

Mr. Bromley: We make the usual objection.

Justice Stephens: Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 420, was received in evidence.)

By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked
3896 for identification as Government's Exhibit 421, the same being a letter dated June 21, 1929, addressed to the United States Gypsum Company, and signed George N. Lenci, Vice President.

(The document referred to was marked as Government's Exhibit No. 421 for Identification.)

By Mr. Knuff:

Q. Do you recognize that, Mr. Lenci, as a copy of a letter that you sent to the United States Gypsum Company? A. Yes.

Q. Now at that time, that is, on June 21, 1929, were you in production yet on your closed-edge board? A. I can't tell you, I don't know.

Q. What is your best judgment on that?

Mr. Bromley: I object to his judgment. If he can't tell, he can't tell.

Justice Stephens: Objection sustained.

By Mr. Knuff:

Q. Your license agreement was signed on May 22, 1929? A. That is right.

Q. How long did it take you to equip your plant to get into production on closed-edge board?

Mr. Bromley: I object to it as repetitious. He has already said a month, about.

Justice Stephens: It has been answered.

3897 Mr. Knuff: I don't believe that question has been answered.

Justice Jackson: Is that correct, a month?

Mr. Knuff: He didn't say any such thing as "a month".

Justice Jackson: Did you say "a month"?

The Witness: I don't know the exact time.

Justice Stephens: I thought you testified this morning that it took you about a month to get into operation.

The Witness: Mr. Knuff asked me yesterday, and I said somewhere between a month and two months. It was a very short period. We had to change the equipment to turn the edge.

Justice Stephens: It has been answered, then. He did testify either yesterday or this morning to that effect.

By Mr. Knuff:

Q. Was that on big board or lath that it took you from a month to two months to get into production? A. Yes, it would apply on both, because the machinery for turning the edges was similar for both products.

Q. And do you know when you finally completed your change-over completely so that you were manufacturing nothing else but closed-edge board? A. I don't know the exact time, no, sir.

Q. Can you approximate that time? A. It would be a pure guess.

3898 Q. What? A. It didn't take long, but I don't know how long.

Q. Did you replace your entire board machine? A. No.

Q. You just changed your old board machine over to meet the new conditions? A. Can I explain what the change involved?

Q. Yes.

Mr. Bromley: I object to it as immaterial. What has that got to do with the case?

Mr. Steffen: It may refresh his recollection as to how long it took him to get into production. We would also like to know where he got his machinery.

Justice Stephens: Read the last two or three questions and answers.

(The record was read by the reporter.)

Justice Stephens: What do you wish to prove by it, Mr. Knuff?

Mr. Knuff: I want to refresh this witness' recollection, if it can be refreshed, as to whether or not the extent of the changes would indicate to him when the change-over was completed.

Justice Jackson: Hasn't he already testified it was between one and two months?

Mr. Knuff: Yes.

3899 Justice Stephens: What is the importance of the exact date of the change? I am not saying that it

is not important, I just want to know so I can make a sensible ruling.

Mr. Knuff: Look at the first paragraph of this letter, please: "* * * * we are changing our price list immediately in accordance with this information."

Justice Stephens: Is this Exhibit 421?

Mr. Knuff: This is Exhibit 421, Your Honor.

Justice Stephens: Let me read it again.

Now, what do you want to prove by the question in connection with the equipment?

Mr. Knuff: I want to know whether or not, at that time, they were pricing their open-edge board, or whether this change related to the price of closed-edge board. Obviously if the change-over hadn't been made, what they were doing at this time was pricing the open-edge board in accordance with the information that the bulletin contained.

Justice Stephens: Then you may have an answer to the last question, if it is preliminary to trying to fix the witness' memory on the time of the actual commencement of manufacture of closed-edge board. The objection is overruled.

By Mr. Knuff:

Q. You started to answer the question by making an explanation, and at that time Mr. Bromley made an
3900 objection. The Court has said that you may make the explanation. Will you proceed, Mr. Lenci? A. The only change involved was—when you make an open-edge board, the board is made wider than necessary and at the far end of the machine there are saws that cut off the raw, damaged edges. When you make a closed-edge board, you use a wider paper and that paper is turned at the beginning of the process. In other words, the paper goes into the machine and the plaster goes on top of it, and the edge is turned over and tucked under the top sheet of paper. The only changes in the machine were the elimination of the cutting saws, the trimming saws, at the far end; and the substitution of the little machine for turning the edges at the near end of the machine.

Q. There would be another change also, and that would be that you would have to secure a wider width of paper in order to turn it over, would you not? A. Yes, that is true.

Q. Now then, do you recall how long it took to make these change-overs? A. It wouldn't take very long. I

couldn't give the exact time, but it was just a question of a few weeks, 2 or 3 or 4 weeks, probably.

Mr. Knuff: If Your Honor pleases, we offer Exhibit 421 in evidence.

3901 Mr. Bromley: We make only the usual objection.

Justice Stephens: Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 421, was received in evidence.)

By Mr. Knuff:

Q. Will you look at the next to the last paragraph of that exhibit, Mr. Lenci, and see whether or not that refreshes your recollection as to whether or not you were distributing your products through jobbers on or about June 21, 1929?

You mentioned Coeyman this morning, and you also mentioned the Abbey Company this morning, do you remember that? A. Yes.

Q. Now I notice in here the name G. B. Raymond & Company. Do you see that? A. Yes.

Q. Were they jobbers? A. Yes.

Q. And I notice the name Eastern Builders Supply Company, Baltimore, Maryland; were they jobbers? A. Yes.

Q. In addition to those three, and the Abbey
3902 Company, can you recall any other jobbers that you were distributing your products through? A. I don't remember.

Q. Do you know the Teachout Company in Cleveland? A. No.

Q. Did you ever hear of them? A. I have heard of them.

Q. You weren't distributing through the Teachout Company? A. No.

Q. Did you know the name of Orin Perry in New York? A. Yes.

Q. Were you distributing through Mr. Perry? A. No.

Q. Do you know whether or not Mr. Perry was a jobber?

Mr. Bromley: I object to that as incompetent. Mr. Perry has already told us what he was.

Justice Stephens: What is the opinion of this witness worth in the face of Mr. Perry's own testimony as to what he did?

Mr. Knuff: Mr. Perry told us what he did—

Justice Jackson: This man's opinion wouldn't make any difference, would it, since Mr. Perry told the Court what his business was? It couldn't change it.

Mr. Knuff: That is probably right.

3903 Justice Stephens: Objection sustained.

By Mr. Knuff:

Q. Mr. Lenci, I show you what has been marked for Identification as Government's Exhibit 422, the same being a letter of July 3, 1929, addressed to the Ebsary Gypsum Company and signed John E. MacLeish.

(The document referred to was marked as Government's Exhibit No. 422 for Identification.)

By Mr. Knuff:

Q. Did you receive that letter? A. Did you say from the United States Gypsum Company?

Q. No, signed John E. MacLeish. A. Oh, yes.

Q. You say you did receive this letter? A. Yes.

Mr. Knuff: We offer it in evidence, if your Honor please, as Government's Exhibit 422.

Mr. Bromley: We make the usual objection.

Justice Stephens: Received, subject to the usual reservation with respect to the declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 422, was received in evidence.)

3904 By Mr. Knuff:

Q. In this exhibit, Mr. Lenci, I notice that there was to be a meeting held on July 9, 1929. Did you attend that meeting? A. I don't remember.

Q. You did attend a meeting on the 22nd of May, and you attended one on the 6th of June? A. Yes.

Q. Now between the 6th of June and the 9th of July, did you attend any meetings? A. I don't remember.

Q. And by "meetings", I mean meetings with other gypsum manufacturers, concerning a proposed license agreement. A. Yes.

Q. You don't remember? A. I don't remember.

Q. And you don't recall whether or not you attended this meeting on the 9th of July? A. No.

Q. You have no recollection about that? A. No.

Q. Were you at a meeting on the 26th of June? A. No. While you were asking about this, I was trying to think back about the 26th of June, and I was wondering
3905 if that meeting hadn't been put off until July 9th.

Q. Do you recall whether it had or not? A. No, I don't. I am just trying to think. I don't remember.
3906 Q. I show you what has been marked for identification as Government's Exhibit 423, the same being a copy of a letter dated the 17th day of July, 1929, addressed to H. W. Rippey, and signed Ebsary Gypsum Company, by George N. Lenci, Vice President.

(The document referred to was marked as Government's Exhibit No. 423, for identification.)

By Mr. Knuff:

Q. Would you state, Mr. Lenci, whether or not you wrote that letter? A. Yes.

Mr. Knuff: I offer in evidence Government's Exhibit No. 423.

Mr. Bromley: We make the usual objection.

Justice Stephens: Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 423 was received in evidence.)

By Mr. Knuff:

Q. You will notice in the second paragraph of that letter, Mr. Lenci, that there was a meeting to be held on July 25, at the Palmer House—do you notice that? A. Yes.
3907 Q. Do you know whether or not you attended that meeting? A. I don't recall, but I do recall making a trip to Chicago during that summer with Mr. Rippey. Whether it was for that meeting, or the one before, or one after it, I don't know. It might have been this one.

Q. When you say you made a trip to Chicago with Mr. Rippey, can you tell us whether that trip was between the meeting that you attended on June 6th, and July 25th, as mentioned in the second paragraph of this letter? A. I don't really know.

Q. You can't place the date between the 6th of June and the 25th of July? A. No.

Q. Mr. Rippey was not with you at the meeting on the 6th of June, was he? A. I don't think so. No, he was not at that meeting.

Q. Now at this meeting that you said you went out to attend, that you went out to Chicago to attend, with Judge Rippey, who else attended that meeting other than yourself and Mr. Rippey? A. I don't remember.

Q. Did any person? Were any other companies represented? A. I really have no recollection of it at all.

Q. All that you can recall now is that at some time, you believe in the summer of 1929, you did go to Chicago
3908 to attend some meeting with Mr. Rippey? A. Yes.

Q. And that is the extent of your present recollection? A. Yes, that is right. I don't have anything to place it in my mind.

Q. I show you, Mr. Lenci, what has been marked for identification as Government's Exhibit 424, the same being a letter dated April 5, 1930, addressed to yourself and signed by C. Henning.

(The document referred to was marked as Government's Exhibit No. 424, for identification.)

By Mr. Knuff:

Q. Will you state whether or not you received that letter. A. Yes.

Q. Now the date of that letter is April 5, 1930—do you notice that? A. Yes.

Mr. Knuff: We now offer in evidence Government's Exhibit 424.

Mr. Bromley: The same objection.

Justice Stephens: Let the Court read it.

(After reading proposed Government's Exhibit No. 424.)

Received, subject to the usual reservation with re-
3909 spect to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 424 was received in evidence.)

By Mr. Knuff:

Q. Now on April 5, 1930, was the Ebsary Gypsum Company manufacturing an open-edge board? A. No.

Q. They had completely changed over their plant so they were then manufacturing a closed-edge board, is that correct? A. That is right.

Q. Do you know at that time whether the United States Gypsum Company was manufacturing an open-edge board? A. No.

Q. Do you mean that they weren't, or do you mean that you don't know, which? A. I don't think anybody was making an open-edge board.

Q. No person was making an open-edge board in the industry at that time? A. No.

Q. You will notice on the left-hand side of this letter a memorandum. Can you translate that for us? A. I think it reads, "See correction in letter of April 15th".

Q. Is that your handwriting? A. Yes, that is my
3910 handwriting.

Q. "See correction in letter of April 15th"? A. Yes.

Q. What does that mean? A. I imagine that later there was another letter written by United States Gypsum Company under date of April 15th which corrected something in this. I don't know.

Q. You will notice in Exhibit 424 that it states, "Sizes only of 16″x48″ and 16″x32″ bundled".

Do you notice that? A. Yes.

Q. Can you tell us what the business reason was for confining the size to 16″x48″ and 16″x32″, if you know? A. Yes, I know what it was.

Q. What was the reason? A. The whole point of this bulletin is that in manufacturing gypsum board there are a certain number of boards which are not perfect, and they are cut up into small sizes which we call "recuts", and this bulletin was setting a price for these recut boards made from the big boards which were made in the usual way, with a closed edge.

Q. That was called an open-edge board? A. They were called recuts, not open-edge. Everybody knew them as recuts.

Q. They were an open-edge board? A. They might
3911 be open-edge or closed-edge. One side, if it happened to be that it came with a finished edge on one side of the board it was cut from, might have a finished edge, or it might have an open edge. But they were known as recuts, and this bulletin was to tell us that we could sell recut board in certain territories, which recuts where made from board made under the license.

Q. And you could sell that in certain territories and you could also sell that only in certain sizes, is that correct? A. That is correct.

Q. What was the business reason why those sizes were limited, if you know? A. I don't know.

Q. And this bulletin only applied to certain designated areas, is that correct? A. That is correct.

Q. And what is the reason, what is the business reason, if you know, why only certain designated areas were prescribed as a recut market? A. Well, if you will look over the list of cities there you will see that they are mostly the larger cities in the Eastern part of the United States.

Q. What is the business reason? A. And the dealers in these larger cities could dispose of these recut boards much easier than a dealer in a small country town who
3912 bought board and had to keep it a long while in that town.

Q. And you would say that the business reason for that, then, was that this recut board could be disposed of in larger cities to a greater advantage than it could in smaller communities? A. That is right.

Q. And you could only sell this board in certain designated areas, is that correct? A. Yes.

Q. And the areas were all designated in the license bulletins? A. That is right.

3913 Justice Stephens: The Court will take the afternoon recess at this time.

Just a moment, however, before we adjourn.

I would like to call the attention of counsel on both sides of the case, but especially of Government counsel who raise this question so frequently, to the little text-book called "Hughes on Evidence", which is based on Thayer's "Cases on Evidence", and is one of the best books that I know of. I don't do this in any school-teaching sense of the term, but only to illustrate how the Court is making its rulings and why it is making its rulings as it is on past recollection recorded and present recollection refreshed. I have found in my experience as a judge that this little statement here is as clear and definite and well-founded a statement of the rule as exists. It will perhaps save a lot of time if counsel understand the basis of the Court's rulings.

Section 21, at page 336, states:

"For the purpose of refreshing his present memory a witness may examine memoranda. Where the examination is made for this purpose it is immaterial by whom, or when, the memoranda were made. In this case, the memoranda themselves are, as a rule, inadmissible. After making the examination, the witness testifies independently of them.

As said by Lord Chief Justice Ellenborough, 'If upon looking at any document he can so far refresh his memory as to recollect a circumstance, it is sufficient, and it
3914 makes no difference that the memorandum is not written by himself, for it is not the memorandum that is evidence, but the recollection of the witness.'"

In Section 22 it is pointed out that:

"Although a memorandum which is used by a witness merely to refresh his memory is not, as a general rule, admissible in evidence, the opposing counsel have the right to inspect it and to cross-examine him upon it. Moreover, the jury (in this instance the Court) also have the right to inspect it" in order "to test the veracity of the witness." • • • "'The other party had a right to know what the memorandum was on which he relied, and whether it had any legitimate tendency to bring the fact in controversy to mind. It would be a dangerous doctrine which would permit a witness to testify from secret memoranda in the way which was permitted here'."

That makes perfectly clear—and it is supported by a substantially unbroken line of authorities—that where you are refreshing a present recollection, while the memorandum is inspectable by Court and counsel, it is not evidence itself and it isn't admissible in evidence.

On the other hand, when you get to past recollection recorded, there the rule is, as set forth in Section 23:

"Not only may a witness use memoranda to refresh his present memory, but he may also adopt memoranda as a record of past recollection. In the former case he
3915 testifies independently of the memoranda, in which case the memoranda themselves, as previously stated, are usually inadmissible. In the latter case his testimony is based upon the memoranda which are themselves admissible. In the former case he swears to an actual present recollection. In the latter case he swears to recorded facts because of his confidence in the correctness of the memoranda. As said by Chief Justice Simpson, 'The rule upon this subject, in its broadest outline, embraces two classes of cases: first, where the witness, after referring to the paper, speaks from his own memory and depends upon his own recollection as to facts testified to; second, where he relies upon the paper and testifies only because he finds the facts contained therein'."

It is essential, in the second case of past recollection recorded, "that the memorandum was made at or about the time the events recorded therein occurred, and that it be verified and adopted by the witness as a record of past recollection"—in which event the witness is not testifying to his present memory, he is only testifying to the correctness of the memorandum, and his oath as to that makes the memorandum, since he states it was made at or about the time of the events which it purports to describe, and since he states that it describes them correctly—makes the memorandum itself admissible in evidence.

Now I apologize for taking the amount of time I
3916 have on this, but we have been debating, ever since the beginning of this case, as to whether these little items are admissible in evidence, and I state this for the guidance of counsel so that they will understand the rules the Court has followed and which it believes are well settled.

Now Exhibit 419 for Identification, since you state it is typical of a large class of evidence, seems to have been used by the witness to refresh a present recollection, and is not past recollection recorded. It doesn't even purport to be a past recollection recorded, in any sense of being a completed declaration. It is merely an itemization of disconnected statements which the witness himself did not say was a complete record of what took place at the meeting to which it is alleged to relate. He states merely that it refreshes his memory.

We are not assuming to rule that the Government cannot introduce declarations which are partly oral and partly in writing, if they are in the nature of declarations. But it was made perfectly clear through this witness that this was merely a memorandum being used to refresh recollection.

I hope I have made the Court's rulings clear.

Did you want to say something, Mr. Knuff?

Mr. Knuff: I guess I had better not.

Justice Stephens: Feel quite free to do so if you don't understand the Court's statement.

Mr. Knuff: I understand your Honor's statement.

3917 (Whereupon, at 4:10 o'clock, p. m., the hearing was recessed until Thursday morning, February 17, 1944, at 10:00 o'clock).

3918 IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA,

Plaintiff,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS,

Defendants.

Seventh Floor,
Internal Revenue Building,
Washington, D. C.,
Thursday, February 17, 1944.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

APPEARANCES:

(Same as heretofore noted.)

3922 Thereupon, GEORGE N. LENCI the witness on the stand at the time of adjournment, resumed the stand and testified further as follows:

Direct Examination (resumed)

By Mr. Knuff:

Q. Mr. Lenci, I show you what has been marked for identification as Government's Exhibit 425, the same being a letter dated April 15, 1930, addressed to George N. Lenci, and signed C. Henning, Vice President in Charge of Sales.

(The document referred to was marked as Government's Exhibit No. 425 for Identification.)

By Mr. Knuff:

Q. Did you receive that letter?

Justice Jackson: That is in this second group of exhibits?

Mr. Knuff: I believe it is in the second group of letters that I furnished the Court. It is dated April 15, 1930. It is on the letterhead of the United States Gypsum Company and is dated April 15, 1930, Judge Jackson—a one-page exhibit.

Justice Jackson: I have it.

By Mr. Knuff:

Q. Did you receive that letter, Mr. Lenci? A. Yes.

3923 Mr. Knuff: We offer in evidence Government's Exhibit 425.

Mr. Bromley: We make only the usual objection.

Justice Stephens: Received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 425, was received in evidence.)

By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked for Identification as Government's Exhibit 426, the same being a letter addressed to Mr. Fred Ebsary, President, and signed C. Henning, Vice President in Charge of Sales. That is dated June 3, 1930.

(The document referred to was marked as Government's Exhibit No. 426 for Identification.)

By Mr. Knuff:

Q. Was that letter received at the office of the Ebsary Gypsum Company? A. Yes.

Mr. Knuff: We offer in evidence Government's Exhibit No. 426, Your Honor.

Mr. Bromley: We make the usual objection.

3924 Justice Stephens: Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 426, was received in evidence.)

By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked for Identification as Government's Exhibit 427, the same being a letter dated February 11, 1931, addressed to Mr. Fred Ebsary and signed C. Henning, Vice President in Charge of Sales.

(The document referred to was marked as Government's Exhibit No. 427 for Identification.)

By Mr. Knuff:

Q. I ask you whether or not that letter was received at the offices of the Ebsary Gypsum Company? A. Yes.

Mr. Knuff: We offer in evidence Government's Exhibit No. 427.

Mr. Bromley: We make only the usual objection.

Justice Stephens: Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

3925 (The document referred to, marked as Government's Exhibit No. 427, was received in evidence.)

By Mr. Knuff:

Q. Mr. Lenci, referring to Government's Exhibits 425, 426 and 427, is it your understanding that these bulletins refer to the price of recut gypsum board, known as recuts? A. Yes.

Q. Is it your understanding that that is the same class of board that was covered by the bulletin offered in evidence as Government's Exhibit 424? A. May I see that exhibit?

(Government's Exhibit 424 handed to the witness.)

By Mr. Knuff:

Q. If I understand your testimony correctly, you said that it was your understanding that Exhibit No. 424 applied to recut gypsum lath, and I want to know whether Exhibits 425, 426 and 427 are bulletins covering the same character of lath? A. Yes, it is.

Justice Stephens: In other words, where the words "open-edge gypsum board" are used in those exhibits, it doesn't mean board manufactured as open-edge gypsum board but board manufactured as closed-edge board

3926 and then recut?

The Witness: That is correct.

By Mr. Knuff:

Q. I show you, Mr. Lenci, what have been marked for identification as Government's Exhibits 428 and 428-A, 428 being a carbon copy of a letter dated January 20, 1930, addressed to Mr. C. F. Henning, and signed George N. Lenci, Vice President; and 428-A being the original of a letter which purports to be a reply to your letter of January 20, 428-A being dated January 22, 1930, addressed to you and signed C. Henning, Vice President in Charge of Sales.

(The documents referred to were marked as Government's Exhibits 428 and 428-A for Identification.)

By Mr. Knuff:

Q. Did you write the letter of which Exhibit 428 is a copy, and did you receive the reply which is marked Government's Exhibit 428-A? A. Yes.

Mr. Knuff: We offer in evidence Government's Exhibits 428 and 428-A, Your Honor.

Mr. Bromley: And we make only the usual objection.

Justice Stephens: Received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents referred to, marked as Govern-
3927 ments Exhibits 428 and 428-A, were received in evidence.)

By Mr. Knuff:

Q. Mr. Lenci, in exhibit 428 you wrote to the United States Gypsum Company and asked them whether or not the Teachout Company of Cleveland, Ohio, may be considered as a wallboard jobber. What was your purpose in writing that letter? A. Well, at the present time, I have not the slightest recollection of why I asked for that information. We were not selling in Ohio, as I remember it, at that time, and I don't really know. We might have had an inquiry, but that would be purely suppositious.

Q. You haven't any present recollection as to the purpose in writing this letter? A. Not the slightest.

Q. After you received the reply from Mr. Henning, advising you that the Teachout Company was not considered a jobber, do you know whether or not you sold the Teachout Company? A. No, we never had previously, nor have ve since, sold to the Teachout Company.

Q. I show you, Mr. Lenci, what has been marked for identification as Government's Exhibit 429, the same being a copy of a letter dated February 13, 1930, addressed
3928 to Mr. C. F. Henning and signed Ebsary Gypsum Company, George N. Lenci, Vice President.

(The document referred to was marked as Government's Exhibit No. 429 for Identification.)

By Mr. Knuff:

Q. Will you tell us whether Exhibit 429 is a copy of a letter that you did write Mr. Henning? A. Yes.

Mr. Knuff: We offer in evidence Government's Exhibit No. 429.

Mr. Bromley: And we make only the usual objection.

Justice Stephens: Received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 429, was received in evidence.)

By Mr. Knuff:

Q. You will notice in the first paragraph of that letter, you are asking the United States Gypsum Company whether Winslow & Company, of Portland, and John Varick, of Manchester, New Hampshire, are considered as jobbers. Can you tell us the purpose or the reason why you wrote that letter to Mr. Henning? A. I think
3929 that we had an inquiry from our New England salesman—

Q. (Interposing) When you say you "think", do you mean by that that that is your present recollection? A. That is my present recollection.

Q. Go ahead with your answer. A. That finishes it. The inquiry asked if we could sell these two companies as jobbers.

Q. You had an inquiry from your New England representative asking whether the Ebsary Gypsum Company would be in a position to sell them as jobbers? A. Yes.

Q. And why did you write to Mr. Henning? A. Well, I wrote to him because at that time the question of jobbers was still open.

Q. By that, what do you mean, Mr. Lenci? When you say "the question was still open", what do you mean? A. As I remember—you might correct me if I am wrong—I

think this is prior to the time when the bulletins specified that jobbers were to be sold at the dealer price.

Mr. Bromley: That is right.

Mr. Knuff: That is correct.

The Witness: And we, being new in the business, did not know whether or not these people were jobbers, and I was asking for this information.

3930 By Mr. Knuff:

Q. Well, didn't your company determine for itself as to their policy as to who was and who was not a jobber? A. Yes, but I was asking for whatever information I could get.

Q. Well, did you think, at that time, that Mr. Henning could give you some information as to whether or not they were jobbers, these firms? A. Yes.

Q. And do you recall whether or not he did give you the information? A. That I don't remember, whether we got a reply or not.

Q. Do you recall whether or not you sold Winslow & Company of Portland, Maine, and John Varick of Manchester, New Hampshire, as jobbers? A. My recollection is that we did not sell either of those companies at that time, but very much later—and by that I mean 10 years later—I think we sold John Varick.

Q. As a jobber? A. No, as a dealer.

Q. What was the sales policy of the Ebsary Gypsum Company, at that time, as to selling through jobbers? Was it favorable to having its products sold through jobbers? A. No, it was not.

3931 Q. It was not? A. That is right.

Q. The policy of the Ebsary Gypsum Company at that time was to distribute their products through dealers rather than through jobbers, is that correct? A. Yes.

Q. And has that been a consistent policy from that time up to the present time—and by that I mean, has it been the consistent policy of the Ebsary Gypsum Company to sell through dealers rather than through jobbers? A. That has always been our policy.

Q. Now can you tell us what reasons you had for adopting that policy? A. Well, the primary one was that we got more money for our material.

Q. Is that the only reason? A. That is the principal reason.

Q. Were there any other reasons? A. The other reason would be that if you were selling a jobber in a large town, and then you had other dealers there, this jobber very often would take the material which he bought at the jobber's discount and sell it to the ultimate consumer in competition with our own dealers that were paying us our usual dealer's price, and we set up an artificial competition against ourselves.

3932 Q. By saying that you "set up an artificial competition against yourselves", did you mean that the person that you sold as a jobber would be in a position, probably, to cut the price, and since you were furnishing the material you would be more or less competing with yourself; is that what you mean? A. That is exactly it.

Q. And you didn't want the jobbers, you didn't want any person to be in a position to be able to cut the price of the product, is that correct? A. That is correct, yes.

Q. Because if they did, they would compete with you? A. Yes.

Q. And you would be furnishing— A. (Interposing) Furnishing the material at a cheaper price.

Q. I see.

Now when you say that they would be in a position to cut the price, do you also mean that they would be in a position to cut the price to dealers? A. I can only speculate on that.

Q. Well, what do you mean by that? A. Well, they would have a commission as a jobber—

Justice Stephens: (Interposing) Do you mean a discount?

3933 The Witness: Yes, a discount. They would have a jobber's discount. Say, for argument's sake, it was 10 percent. They could split part of that commission and keep, say, 5 percent, and undersell us with one of our dealers by the other 5 percent.

By Mr. Knuff:

Q. Now you say that they could "split" that 10 percent. Split it with whom, the dealer? A. Yes, they would keep 5 percent and quote the dealer 5 percent less than we would quote the dealer.

Q. And that is another reason why you were opposed to jobber distribution of your products? A. Yes.

Q. You wanted the good will of your dealers? A. That is correct.

Q. And you wanted to sell those dealers at a uniform price, is that correct? A. Yes.

Q. I show you, Mr. Lenci, what has been marked for identification as Government's Exhibit 430, the same being a letter dated August 8, 1930, addressed to Mr. Fred Ebsary and signed C. Henning, Vice President in Charge of Sales.

(The document referred to was marked as Government's Exhibit No. 430 for Identification.)

3934 By Mr. Knuff:

Q. Will you state whether that letter was received at the office of the Ebsary Gypsum Company? A. Yes.

Mr. Knuff: We offer in evidence, if Your Honors please, Government's Exhibit 430.

Mr. Bromley: We make only the usual objection.

Justice Stephens: Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 430, was received in evidence.)

By Mr. Knuff:

Q. Prior to the time that you received Government's Exhibit 430, what was the jobber's commission or discount, in percentage? A. I think it was 10 percent.

Q. Ten percent? A. Yes.

Q. That is, the person who was acting as a jobber, if lath was selling at $13.00 a thousand, they bought it at a discount of 10 percent, or $1.30 off that price? A. That is my recollection.

Mr. Bromley: That appears in Exhibit 408 as 10 percent.

3935 By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked for identification as Government's Exhibit 431, the same being a memorandum dated 9/22/30, addressed to you and signed George P. Turner.

(The document referred to was marked as Government's Exhibit No. 431 for Identification.)

By Mr. Knuff:

Q. You received this memorandum from Mr. Turner, did you not? A. Yes.

Q. At that time, Mr. Turner was the Sales Manager for the Ebsary Gypsum Company? A. At that time, yes.

Q. And Mr. Turner directed the sales policy of your company at that time, did he not? A. I would like to correct that. He was the City Sales Manager for the New York City area.

Q. For the New York City area? A. That is right.

Q. And he performed a function similar to that performed by Mr. Gallagher of the United States Gypsum Company —do you know Mr. Gallagher? A. Yes, I do.

3936 Q. Mr. Gallagher is the City Sales Manager for the United States Gypsum Company? A. Yes, except Mr. Turner never had the authority that Mr. Gallagher does.

Q. In the City of New York, Mr. Turner directed the sales policy of the Ebsary Gypsum Company, is that correct? A. I would say he followed out the sales policy of the Ebsary Gypsum Company.

Mr. Knuff: We offer in evidence, if Your Honors please, Government's Exhibit 431.

Mr. Bromley: And we make only the usual objection.

Mr. Oliver: I object to it, Your Honor, on the ground that it is only binding on Ebsary and not on the other defendants.

Justice Stephens: That raises no new point, Mr. Oliver. All of these declarations of individual defendants are offered to bind all the defendants, but are received subject to the usual reservation with reference to the declarations of alleged co-conspirators, that a conspiracy must ultimately be shown and the declaration be shown to be in execution or furtherance of the conspiracy. Are you raising any point different than that?

Mr. Oliver: I think it is in the same category as that answer of Certain-teed in the Beaver case, and when you ruled on that, you ruled that it was only binding on

3937 Certain-teed. This seems to be a declaration of the same kind, to me.

Justice Stephens: That was offered as an admission, was it not, rather than a declaration?

Mr. Oliver: That is possible, Your Honor.

Justice Jackson: That is what it was, as I remember it.

Justice Stephens: I don't see any difference, Mr. Oliver, between this and any other class of declaration we have had. The objection is overruled. The exhibit is received subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 431, was received in evidence.)

Justice Stephens: It may be, of course, that the Court misunderstood the nature of the offer of the answer in the Beaver Products case. The Court is trying to keep all of its rulings strictly consistent. It is very difficult, in such a complicated case as this. But I thought that was in a different category than the general declarations which have been offered.

By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked
3938 for identification as Government's Exhibit 432, the same being a letter dated March 4, 1932, addressed to Mr. F. G. Ebsary, President, and signed C. Henning, Vice President.

(The document referred to was marked as Government's Exhibit No. 432 for Identification.)

By Mr. Knuff:

Q. Did the Ebsary Gypsum Company receive that letter? A. Yes.

Q. I show you what has been marked—

Justice Stephens: (Interposing) Let the Court have time to read that, Mr. Knuff, so that we can understand your examination.

Mr. Knuff: I am sorry.

(Exhibit 432 examined by the Court.)

Justice Stephens: Proceed, Mr. Knuff.

By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked for identification as Government's Exhibit 433, the same being a letter dated February 16, 1934, addressed to Mr. George N. Lenci, and signed C. Henning, Vice President.

(The document referred to was marked as Government's Exhibit No. 433 for Identification.)

By Mr. Knuff:

3939 Q. Was Government's Exhibit 433 received in the office of the Ebsary Gypsum Company? A. Yes.

Q. I show you, Mr. Lenci, what has been marked for Identification as Government's Exhibit 434, the same being a letter dated December 3, 1934, addressed to F. G. Ebsary, President, and signed C. Henning.

(The document referred to was marked as Government's Exhibit No. 434 for Identification.)

By Mr. Knuff:

Q. I will ask you if that letter was received at the office of the Ebsary Gypsum Company? A. Yes.

Q. I show you what has been marked for identification as Government's Exhibit 435, the same being a letter dated October 29, 1935, addressed to Mr. F. G. Ebsary, and signed C. Henning, Vice President.

(The document referred to was marked as Government's Exhibit No. 435 for Identification.)

By Mr. Knuff:

Q. I will ask you if that letter was received in the office of the Ebsary Gypsum Company? A. Yes.

3940 Mr. Knuff: We offer in evidence Government's Exhibits 432, 433, 434, and 435.

Mr. Bromley: We make the usual objection to these last four exhibits.

Justice Stephens: They are received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents referred to, marked Government's Exhibits 432, 433, 434 and 435, were received in evidence.)

By Mr. Knuff:

Q. If I understand these exhibits correctly, Mr. Lenci, Mr. Frank Miller was the first Executive Secretary of the Board Survey Company, and he was succeeded by Mr. H. F. Sadler in 1934; and Mr. Sadler, in turn, was succeeded by Mr. E. W. Carey as the Executive Secretary of the Board Survey Company; is that your understanding? A. That is correct.

Q. And these three gentlemen, that is, Mr. Miller, Mr. Sadler and Mr. Carey, were the only Executive Secretaries of the Board Survey Company? A. They are the only ones I ever heard of.

Q. And after October 29, 1935, complaints, if any, were sent to the office of Scott, MacLeish & Falk, the attorneys for the Board Survey Company; is that correct? A. 3941 I don't think that letter of October 29 reads just that way. The second paragraph says that the complaint shall be filed in the usual way with the Board Survey Company, who in turn will refer the complaint to Scott, MacLeish & Falk.

Q. I accept that correction. A. Yes.

Q. What was the Board Survey Company, Mr. Lenci? A. I don't know.

Q. You don't know what it was? A. I think it was merely a subsidiary of the United States Gypsum Company. That is all I know about it. I don't know anything about it.

Q. When you had any complaint as to any violation of the license agreement, that is, if you felt that another licensee was not complying with the license agreement, you would send that complaint to the Board Survey Company? A. That is right.

Q. And the Board Survey Company would, in turn, if you know, investigate the merits of your complaint, and would take such steps as were necessary to correct the complaint, if the complaint was justified; is that correct? A. Yes.

Q. Mr. Lenci, I show you what have been marked Government's Exhibits 436 and 436-A, 436 being a letter 3942 dated April 20, 1932, addressed to Mr. Hough and signed Ted Ehrlicher; and 436-A being a typewritten copy of Exhibit 436.

Mr. Knuff: If Your Honors please, in order to expedite the reading of this exhibit, we had 436-A typed. That is an exact copy of 436.

Justice Stephens: Thank you.

(The documents referred to were marked Government's Exhibits 436 and 436-A for Identification.)

By Mr. Knuff:

Q. Mr. Lenci, who was Ted Ehrlicher? A. He was one of our New Jersey salesmen.

Q. And who was Mr. Hough? A. Mr. Hough was our Treasurer.

Q. The Treasurer of the Ebsary Gypsum Company? A. Yes.

Justice Stephens: Ehrlicher, you say, was one of your salesmen?

The Witness: Ehrlicher was our New Jersey salesman.

By Mr. Knuff:

Q. Do you identify Government's Exhibit 436 as a letter that was received by Ebsary Gypsum Company from Mr. Ehrlicher? A. Yes.

3943 Mr. Oliver: May I see that for just a moment?

Justice Stephens: Yes.

(Thereupon, Government's Exhibit No. 436 for identification was handed to Mr. Oliver for examination.)

By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked Government's Exhibit 437, the same being a letter dated May 5, 1932, addressed to the Ebsary Gypsum Company and signed C. E. Hough.

(The document referred to was marked as Government's Exhibit No. 437, for identification.)

By Mr. Knuff:

Q. Did you receive that letter, Mr. Lenci? A. Yes.

Q. I show you—

Justice Stephens: (Interposing) Just a moment, let the Court read it. We must be familiar with each of these as we go along.

Mr. Knuff: I am sorry.

Justice Stephens: Proceed, Mr. Knuff.

By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked for identification as Government's Exhibit 438, the same being a copy of a letter dated May 6, 1932, addressed to the Board Survey Company, and signed George N. Lenci.

3944 (The document referred to was marked as Government's Exhibit No. 438, for identification.)

By Mr. Knuff:

Q. Will you state, Mr. Lenci, whether that is a copy of a letter which you sent to the Board Survey Company? A. Yes.

Justice Garrett: Mr. Knuff, does that have more than one page?

Mr. Knuff: Yes, your Honor, it is a two-page letter.

Justice Garrett: Yes, I see it now, thank you.

Justice Stephens: Proceed.

Mr. Knuff: Will your Honors indulge me for just a moment, please?

Justice Stephens: Yes, certainly.

Mr. Knuff: If your Honors please, will you skip, in your sets of the exhibits, the letter dated May 16, 1932, and the letter dated May 17, 1932, and then go to the next letter.

By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked Government's Exhibit 439 for identification, which is a letter dated June 9, 1932, addressed to the Ebsary Gypsum Company and signed by C. E. Hough.

(The document referred to was marked as Government's Exhibit No. 439, for identification.)

3945 By Mr. Knuff:

Q. I ask you whether or not that letter was received. That bears in ink, the notation, "Government's Exhibit 36", which was the exhibit number used in the criminal case.

I wonder if we can take the morning recess at this time.

Justice Stephens: Yes, we will take our morning recess at this time.

(Thereupon, a short recess was taken, after which the trial was resumed.)

Justice Stephens: Proceed.

By Mr. Knuff:

Q. Mr. Lenci, did you receive Government's Exhibit 439? A. Yes.

Q. I show you what has been marked for identification as Government's Exhibit 440, the same being a carbon copy of a letter dated June 9, 1932, addressed to Mr. C. F. Henning, Vice President, and signed George N. Lenci, Secretary.

(The document referred to was marked as Government's Exhibit No. 440, for identification.)

By Mr. Knuff:

Q. I ask you if that is a copy of a letter that you sent to Mr. Henning. A. Yes.

3946 Justice Stephens: Referring to Exhibit 439, so that it will be clear in the record whom it refers to, one cannot tell from the face of it whom it refers to—

Mr. Knuff: (Interposing) You mean "Gypsteel"?

Justice Stephens: Yes, what does that mean?

The Witness: Let's start from the beginning. The Structural Gypsum Corporation—

Justice Stephens: (Interposing) Just answer briefly. To whom did Mr. Hough refer, if you know, in his use of the word "Gypsteel"?

The Witness: The Structural Gypsum Corporation.

Justice Stephens: That is all.

The Witness: That was their trade-mark. "Gypsteel" was the trade-mark of another product manufactured by the Structural Gypsum Corporation, and the company became generally known as "Gypsteel". For the record, they became later a part of the American Cyanamid Company.

Justice Stephens: Thank you.

Let us read this June 9th letter.

All right, you may proceed.

Mr. Knuff: Will your Honors please skip the next two letters, the one dated June 17, 1932, and the one dated June 25, 1932, and I will take up the next letter.

By Mr. Knuff:

Q. I now show you, Mr. Lenci, what has been marked
3947 Government's Exhibit 441 for identification, being a copy of a letter dated June 25, 1932, addressed to C. F. Henning, and signed Ebsary Gypsum Company, George N. Lenci.

(The document referred to was marked as Government's Exhibit No. 441, for identification.)

By Mr. Knuff:

Q. I will ask you, Mr. Lenci, if that is a copy of a letter, the original of which was sent to Mr. Henning. A. Yes.

Q. I show you what has been marked for identification as Government's Exhibit 442, the same being a letter dated July 16, 1932, addressed to the United States Gypsum Company and signed George N. Lenci, Secretary.

(The document referred to was marked as Government's Exhibit No. 442, for identification.)

By Mr. Knuff:

Q. I will ask you if that is a copy of a letter, the original of which was sent to the United States Gypsum Company. A. Yes.

Q. I show you, Mr. Lenci, what has been marked for identification as Government's Exhibit 443, the same being a copy of a letter, dated July 26, 1932—

Justice Stephens: (Interposing) Are you skipping
3948 this longhand memorandum?

Mr. Knuff: Yes, I am not going to offer that.

Justice Stephens: This one you are now referring to is dated July 26, 1932?

Mr. Knuff: Yes. It is addressed to the United States Gypsum Company and signed Ebsary Gypsum Company, George N. Lenci, Secretary.

(The document referred to was marked as Government's Exhibit No. 443, for identification.)

By Mr. Knuff:

Q. I will ask you if that is a carbon copy of a letter, the original of which was sent to the United States Gypsum Company. A. Yes.

Q. I show you, Mr. Lenci, what has been marked Government's Exhibit 444 for identification, the same being a letter, dated August 1, 1932, addressed to George N. Lenci, and signed C. Henning, Vice President.

(The document referred to was marked as Government's Exhibit No. 444, for identification.)

By Mr. Knuff:

Q. I ask you if that letter was received. A. Yes.

3949 Q. I show you, Mr. Lenci, what has been marked Government's Exhibit 445 for identification, the same being a carbon copy of a letter, dated August 10, 1932, addressed to Mr. Ebsary, and signed George N. Lenci, Secretary.

(The document referred to was marked as Government's Exhibit No. 445, for identification.)

By Mr. Knuff:

Q. I will ask you if that is a copy of a letter, the original of which was sent to Mr. Ebsary. A. Yes.

Q. I show you what has been marked for identification as Government's Exhibit 446, the same being a letter, dated August 16, 1932, addressed to the United States Gypsum Company and signed Ebsary Gypsum Company, George N. Lenci, Secretary.

(The document referred to was marked as Government's Exhibit No. 446, for identification.)

By Mr. Knuff:

Q. I ask you if that is a carbon copy of a letter, the original of which was sent to United States Gypsum Company. A. Yes.

Mr. Knuff: We now offer in evidence Government's Exhibits 436, 436-A, 437, 438, 439, 440, 441, 442, 443, 444,
3950 445, and 446.

Mr. Bromley: May it please the Court, we make the usual objection, and in addition thereto we would like the record to show that we object to all of these exhibits on the ground that they are immaterial because they relate solely to an issue already heretofore determined adversely to the Government in the criminal case.

Justice Stephens: You are protecting your record in the matter of res adjudicata?

Mr. Bromley: Yes.

Justice Stephens: That objection is overruled.

The exhibits are received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents marked as Government's Exhibits Nos. 436 to 446, inclusive, were received in evidence.)

Justice Stephens: This might be an appropriate time to say, Mr. Oliver, in respect to the objection you raised this morning as to Exhibit 431, that I think I made a statement which might be a little confusing and I ought to correct it.

Exhibit 324, which was the answer of Certain-teed in the Beaver Products case, was received in evidence, and at page 2861, the Court made the following statement:

3951 "Justice Stephens: The Court is agreed that Exhibit 324 is admissible in evidence as an admission of Certain-teed, binding upon Certain-teed, for whatever weight it may be entitled to. It seems to the Court that in view of the nature of the statements in the answer, and the added fact that later Certain-teed did take a license, that it may be said to constitute an admission. But the Court is also agreed that it cannot, at least in the present state of the record, be admitted as binding upon the other defendants as a declaration either in furtherance of or in execution of a conspiracy. It would seem to the Court that, if anything, it would be contrary to the furtherance or execution of the conspiracy."

That was the distinction we had in mind with respect to that, and not the distinction which has been suggested, that

it was different from other declarations because it was an admission. That, I think, would be a false distinction because all of these declarations are admissible so far as the hearsay rule is concerned, on the theory that they are admissions.

The rule that makes them binding, if made by one conspirator, as against others, is not a rule of evidence, it is a rule of substantive law that holds one conspirator to the acts or declarations of another conspirator if a conspiracy is shown, and if it is shown that the acts or declarations are in furtherance or execution of the conspiracy.

So the distinction there was not between an admis-
3952 sion and a declaration. There is no distinction really between the two. It is between an admission, which appears not to be in furtherance or execution of the conspiracy, and one which may be shown to be of such nature.

Proceed, Mr. Knuff.

By Mr. Knuff:

Q. Mr. Lenci, under date of August 16, 1932, did you write a letter to the Board Survey Company concerning Orin F. Perry of New York City? You don't have anything in front of you regarding that, Mr. Lenci.

Justice Stephens: Read the question, please. I was looking for something in these letters also.

(Thereupon, the pending question was read by the reporter.)

The Witness: I don't recall.

By Mr. Knuff:

Q. Could your memory be refreshed as to whether you did write such a letter? A. I believe it might be.

Q. I would like you to look at this paper and see whether or not this paper does refresh your recollection.

Mr. Knuff: The paper I am handing to the witness is in the books of exhibits that your Honors have before you, and the letter is dated August 18, 1932. I am not having it marked as an exhibit at this time because I do not
3953 know whether or not we want to use it as an exhibit.

Justice Stephens: Thank you. Where does it occur with reference to these last exhibits?

Mr. Knuff: Immediately following Exhibit 446, your Honor.

Justice Stephens: Thank you. Have counsel for the defendants seen it?

Mr. Bromley: Yes.

Justice Stephens: Very well, proceed.

By Mr. Knuff:

Q. Does that letter, Mr. Lenci, refresh your recollection as to whether or not you did write a letter to the Board Survey Company concerning Orin F. Perry? A. I think it does.

Q. Do you have the carbon copy of that letter, Mr. Lenci? A. No, sir, I haven't got it.

Q. You turned over to us— A. (Interposing). We turned over everything we had.

Mr. Knuff: I might say, if your Honor pleases, that we don't have the carbon copy of this letter.

Justice Stephens: Ask him if he remembers the episode, and what the complaint was.

The Witness: I remember the circumstances, yes, I don't remember the identical letter referred to that I wrote. But my complaint was that the Certain-teed were still con-
3954 tinuing to sell Orin F. Perry as a jobber.

By Mr. Knuff:

Q. And what was your complaint as to that? A. I believe that this took place after the time that the jobbers were to be sold only at the dealer's price, and not with a special commission to jobbers.

Q. And you complained to the United States Gypsum Company that Orin F. Perry was being sold by Certain-teed as a jobber, is that correct? A. Yes.

Q. You did receive a letter from the Board Survey Company acknowledging your letter of the 16th of August, 1923, did you not? A. Yes.

Q. In addition to the paper that you have before you, did you ever receive anything further, any other letter, from the United States Gypsum Company, with reference to this same matter? A. I don't remember.

Q. Do you know what the ultimate disposition of the matter was? A. Well, I do know that eventually—when I say "eventually" I mean after a period of time—

Q. (Interposing) How long a period of time? A. I would say sometime probably during that year, or 1933—
3955 the practice was discontinued of giving him a special discount.

Q. Mr. Orin F. Perry was unable, then, to buy the board at the dealer discount?

Mr. Bromley: Dealer discount?
Mr. Knuff: I beg your pardon—jobber discount.
The Witness: So far as I know, yes.

By Mr. Knuff:

Q. And you say that that took place sometime after August 18, 1932, or early in 1933. A. I couldn't say the exact time because it is such a long time ago, but it was sometime thereafter.

Q. Did you have any occasion to make any further complaints concerning Mr. Perry other than the complaint that you made under date of August 16?

Mr. Bromley: I object to that as assuming facts not in evidence. The complaint wasn't against Perry, it was against Certain-teed, because Certain-teed sold at a discount.

Justice Jackson: To Perry?
Mr. Bromley: To Perry, yes.
Justice Stephens: That objection is well taken.
Mr. Knuff: What was my question?
Justice Stephens: Read the question.

(Thereupon, the pending question was read by the reporter.)

3956 Justice Stephens: The point of the objection, Mr. Knuff, is that the complaint was not against Perry but against Certain-teed.

Mr. Knuff: I don't believe my question said it was, it said "concerning".

Justice Jackson: Why don't you rephrase your question?

Mr. Knuff: Very well.

By Mr. Knuff:

Q. Did you have any further occasion to complain that any licensee was selling Orin F. Perry and giving Mr. Perry a jobber's commission? A. I don't recall. I mean at the present moment I do not remember.

Q. If you did have an occasion to make such a complaint, do you think you would remember now? A. Well, it is hard to pick out—

Justice Jackson: (Interposing) How can you know?
The Witness: I don't know.

Mr. Knuff: Now there is a series of letters, if your Honors please, that I am going to have marked at this time

only for identification. I do so because Mr. Lenci is the person who can identify them, and I don't think that this would be the proper time to offer them in evidence because it would just break the continuity.

Justice Garrett: Well, you do not offer that letter
3957 of August 18th?

Mr. Knuff: No, your Honor, I do not. It hasn't even been identified as far as I know.

Justice Stephens: Yes, that is not necessary.

By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked Government's Exhibit 447 for identification—and if your Honors please, Government's Exhibit 447 will appear immediately following Government's Exhibit 438 in the books of exhibits which you have—this being a letter dated May 16, 1932, addressed to the Board Survey Company and signed George N. Lenci.

(The document referred to was marked as Government's Exhibit No. 447, for identification.)

By Mr. Knuff:

Q. Will you state, Mr. Lenci, whether or not that exhibit is a carbon copy of a letter, the original of which was sent to the Board Survey Company? A. Yes.

Justice Garrett: Pardon me, that is the letter of May 16, 1932?

Mr. Knuff: That is correct.

Justice Garrett: To Board Survey from Ebsary?

Mr. Knuff: Yes, and the first paragraph of the letter reads:

3958 "Please let us have a reply to our letter of May 6th".

By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked for identification as Government's Exhibit 448, the same being a copy of a letter, dated May 17, 1932, addressed to George N. Lenci, and signed C. Henning, Vice President.

(The document referred to was marked as Government's Exhibit No. 448, for identification.)

By Mr. Knuff:

Q. In connection with the word "signed", Mr. Henning's signature is typed, and Exhibit 448 is apparently a typed copy, not a carbon copy, of a letter bearing date of May 17. It appears in your Honor's books immediately following the letter of May 16.

Mr. Lenci, the original of the letter marked Government's Exhibit 448 for identification was received by you, was it not? A. I don't remember it. Oh, yes, I beg your pardon.

Q. Do you wish to change your answer, that it was received by you? A. Yes.

Q. And is this a copy of a letter that was received by you? A. We received the copy, I have no record of the original.

3959 Q. I understood that you had made this copy—

Mr. Bromley: (Interposing) I don't dispute it, if the Court please. It was received in the criminal case.

Justice Stephens: You don't raise any question as to its identification?

Mr. Bromley: No, sir.

Justice Stephens: The record may show that.

Mr. Knuff: Do any other defendants raise any question as to the identification of this document?

(No response.)

Justice Stephens: It may be taken as identified, then.

With respect to that previous letter of May 16, what was the answer of the witness as to that?

Mr. Knuff: My understanding is that it was a carbon copy of a letter, the original of which was sent to the Board Survey Company.

Justice Stephens: Very well.

Mr. Knuff: Will your Honors now turn to the next two exhibits following Exhibits 439 and 440, which are the next two exhibits that I want to have marked.

By Mr. Knuff:

Q. I show you, Mr. Lenci, Government's Exhibit 449, the same being a copy of a letter, dated June 17, 1932, addressed to Mr. C. F. Henning, Vice President, and signed George N. Lenci, Secretary.

3960 (The document referred to was marked as Government's Exhibit No. 449, for identification.)

By Mr. Knuff:

Q. Will you state, Mr. Lenci, whether that is a carbon copy of a letter that you sent to Mr. Henning? A. Yes.

Q. I show you, Mr. Lenci, what has been marked for identification as Government's Exhibit 450, the same being a letter, dated June 25, 1932, addressed to George N. Lenci, and signed Frank M. Miller.

(The document referred to was marked as Government's Exhibit No. 450, for identification.)

By Mr. Knuff:

Q. Did you receive that letter, Mr. Lenci? A. Yes.

Mr. Knuff: Can we stipulate, Mr. Bromley, that that is Mr. Miller's signature?

Mr. Bromley: Yes.

By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked for identification as Government's Exhibit 451—which will follow in your Honors' books immediately after Exhibit 446—it being a letter, dated August 18, 1932, addressed to
3961 George N. Lenci, and signed Frank M. Miller.

(The document referred to was marked as Government's Exhibit No. 451, for identification.)

By Mr. Knuff:

Q. Was that letter received, Mr. Lenci, by you? A. Yes.

Mr. Knuff: I don't presume, as to these letters that are signed by Frank M. Miller, that there is any question as to Mr. Miller's signature, is there, Mr. Bromley?

Mr. Bromley: No, there is no question as to his signature.

By Mr. Knuff:

Q. I show you what has been marked for identification as Government's Exhibit 452, the same being a letter, dated May 26, 1932, addressed to Mr. C. F. Henning, Vice President, and signed George N. Lenci, Secretary.

(The document referred to was marked as Government's Exhibit No. 452, for identification.)

By Mr. Knuff:

Q. I will ask you if that is a carbon copy of a letter, the original of which was sent to Mr. Henning. A. Yes.

Q. I show you, Mr. Lenci, what has been marked
3962 for identification as Government's Exhibit 453, the same being a letter dated May 31, 1932, addressed to the Board Survey Company, and signed Ebsary Gypsum Company, George N. Lenci, Secretary.

(The document referred to was marked as Government's Exhibit No. 453, for identification.)

By Mr. Knuff:

Q. I ask you if that is a carbon copy of a letter, the original of which was sent to the Board Survey Company? A. Yes.

Q. I show you what has been marked for identification as Government's Exhibit 454, the same being a letter, dated June 9, 1932, addressed to the Ebsary Gypsum Company, and signed C. E. Hough, Treasurer.

(The document referred to was marked as Government's Exhibit No. 454, for identification.)

By Mr. Knuff:

Q. Was that letter received by you, Mr. Lenci? A. Yes.

Q. I show you what has been marked for identification as Government's Exhibit 455, the same being a letter dated June 11, 1932, addressed to the Board Survey Company and signed Ebsary Gypsum Company, George N. Lenci.

3963 (The document referred to was marked as Government's Exhibit No. 455, for identification.)

By Mr. Knuff:

Q. I will ask you if that is a carbon copy of a letter, the original of which was sent to the Board Survey Company. A. Yes. In connection with that, there are some penciled memoranda of names in the corner which were not made by our office or by our company.

Q. Can you tell us what you refer to? A. There is one word, "Beatty", and under that it says "Tomkins Rockwall".

Q. Those were not made by your company? A. Those have been added since this carbon left our office.

Q. Do you recognize the handwriting? A. No, I don't.

Mr. Knuff: In connection with the handwriting that Mr. Lenci has referred to, I want to state to the Court that I don't know whose handwriting it is, and I don't attribute any particular significance to it.

Justice Jackson: There isn't any.

By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked for identification as Government's Exhibit 456, the same
3964 being a carbon copy of a letter, dated June 21, 1932, addressed to the Board Survey Company and signed Ebsary Gypsum Company, George N. Lenci, Secretary.

(The document referred to was marked as Government's Exhibit No. 456, for identification.)

By Mr. Knuff:

Q. I ask you to state whether or not that is a carbon copy of a letter, the original of which was sent to the Board Survey Company. A. Yes.

Q. I show you what has been marked for identification as Government's Exhibit 457, the same being a letter, dated June 23, 1932, addressed to George N. Lenci, Secretary, and signed Frank M. Miller.

(The document referred to was marked as Government's Exhibit No. 457, for identification.)

By Mr. Knuff:

Q. Was that letter, Mr. Lenci, received by your company? A. Yes.

Mr. Knuff: I assume, Mr. Bromley, that there is no question as to Mr. Miller's signature.

Mr. Bromley: On this one, no, sir.

By Mr. Knuff:

3965 Q. I show you what has been marked for identification as Government's Exhibit 458, the same being a letter, dated September 21, 1932, addressed to George N. Lenci, Secretary, and signed Frank M. Miller.

(The document referred to was marked as Government's Exhibit No. 458, for identification.)

By Mr. Knuff:

Q. Will you state whether that letter was received by your company, Mr. Lenci? A. Yes.

Q. I show you—

Justice Stephens: (Interposing) Do you stipulate that signature also, Mr. Bromley?

Mr. Bromley: Yes, your Honor.

Mr. Knuff: Thank you.

By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked for identification as Government's Exhibit 459, the same being a letter, dated September 24, 1932, addressed to the Board Survey Company and signed George N. Lenci.

(The document referred to was marked as Government's Exhibit No. 459, for identification.)

By Mr. Knuff:

3966 Q. Will you state, Mr. Lenci, whether that is the original letter that you sent to the Board Survey Company? A. Yes.

Q. I show you what has been marked for identification, Mr. Lenci, as Government's Exhibit 460, the same being a carbon copy of a letter, dated September 27, 1932, addressed to the Ebsary Gypsum Company and signed United States Gypsum Company—Vice President.

(The document referred to was marked as Government's Exhibit No. 460, for identification.)

By Mr. Knuff:

Q. Can you tell us, Mr. Lenci, whether or not you received the original of this letter? A. Yes.

Q. You will notice that Exhibit 460 is a carbon copy of a letter that we obtained from the United States Gypsum Company's file. Do you now state that you received the original of that letter? A. Yes.

Q. I show you what has been marked for identification as Government's Exhibit 461, the same being a letter, dated December 6, 1932, addressed to the United States Gypsum Company, and signed George N. Lenci, Secretary.

(The document referred to was marked as Govern-
3967 ment's Exhibit No. 461, for identification.)

By Mr. Knuff:

Q. Will you state, Mr. Lenci, whether that is the original letter that you sent to the United States Gypsum Company? A. Yes.

Q. I show you, Mr. Lenci, Government's Exhibit No. 462 for identification, the same being a carbon copy of a letter, dated December 23, 1932, addressed to F. G. Ebsary, and signed United States Gypsum Company.

(The document referred to was marked as Government's Exhibit No. 462, for identification.)

By Mr. Knuff:

Q. Can you tell us whether you received the original of the letter of which Government's Exhibit No. 462 is a carbon copy? A. I don't remember receiving the original, but I do know that we were given that consent, which was probably in that letter referred to.

Mr. Knuff: I wonder if Mr. Bromley will stipulate that this a carbon copy of a letter, the original of which was sent by Mr. Henning to Mr. F. G. Ebsary.

Mr. Bromley: Yes.

By Mr. Knuff:

3968 Q. I show you, Mr. Lenci, what has been marked for identification as Government's Exhibit 463, the same being a letter, dated May 8, 1933, addressed to Ebsary Gypsum Company, and signed Frank M. Miller.

(The document referred to was marked as Government's Exhibit No. 463, for identification.)

By Mr. Knuff:

Q. Will you state, Mr. Lenci, whether you received that letter? A. Yes.

Mr. Knuff: Can it be stipulated, Mr. Bromley, that that is Mr. Miller's signature?

Mr. Bromley: Yes.

By Mr. Knuff:

Q. I now show you, Mr. Lenci, what has been marked for identification as Government's Exhibit 464, the same being a letter, dated May 11, 1933, addressed to the Ebsary Gypsum Company and signed Frank M. Miller.

(The document referred to was marked as Government's Exhibit No. 464, for identification.)

By Mr. Knuff:

Q. Did you receive that letter, Mr. Lenci? A. Yes.

3969 Mr. Knuff: May it likewise be stipulated, Mr. Bromley, that that is Mr. Miller's signature to that letter?

Mr. Bromley: Yes.

By Mr. Knuff:

Q. I notice on the upper left-hand corner of the letter of May 11, 1933, there is some writing in longhand. Can you

translate that writing? A. It was for that reason that I was able to say at once that I had received that letter, because the handwriting in the upper left-hand corner is mine, and it reads, "Copy to New York—5/13".

Q. I show you what has been marked for identification as Government's Exhibit 465, the same being a letter, dated May 29, 1933, addressed to the Ebsary Gypsum Company and signed Frank M. Miller.

(The document referred to was marked as Government's Exhibit No. 465, for identification.)

By Mr. Knuff:

Q. Will you state, Mr. Lenci, whether that letter was received by the Ebsary Gypsum Company? A. Yes.

Mr. Knuff: And I presume it can likewise be stipulated, Mr. Bromley, that that is also Mr. Miller's signature?

Mr. Bromley: Yes.

3970 By Mr. Knuff:

Q. Now on the lower left-hand corner I notice some longhand writing. Will you translate that for us? A. That is in my handwriting also, and it reads, "Copy to EHD & Ask for reply".

Q. I show you, Mr. Lenci, what has been marked for identification as Government's Exhibit 466, the same being a letter, dated May 31, 1933, addressed to the Ebsary Gypsum Company, and signed Frank M. Miller.

(The document referred to was marked as Government's Exhibit No. 466, for identification.)

By Mr. Knuff:

Q. Can you tell us whether that letter was received in the office of Ebsary Gypsum Company? A. Yes.

Mr. Knuff: And likewise, Mr. Bromley, may it be stipulated that that is Mr. Miller's signature?

Mr. Bromley: Yes.

By Mr. Knuff:

Q. On the lower left-hand corner I also notice some longhand writing. Will you translate that for us? A. That is in my handwriting, and it reads, "Copy to EHD—ask him to please write so that I can reply".

Q. And who is "EHD"? A. "EHD" was E. H.
3971 Diegel, who was my assistant.

Q. He was your assistant? A. Yes.

Justice Stephens: There is also some handwriting just to the right of the letters "EHD" in ink, on the photostat which the Court has, reading, "Sent 6-2". Is that your handwriting?

The Witness: No, that is the handwriting of my secretary, it being a memorandum of the date that she sent that.

Justice Stephens: Thank you.

By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked for identification as Government's Exhibit 467, the same being a letter, dated June 13, 1933, addressed to the Board Survey Company and signed George N. Lenci.

(The document referred to was marked as Government's Exhibit No. 467, for identification.)

By Mr. Knuff:

Q. Will you state, Mr. Lenci, if that is the original letter that you sent to the Board Survey Company? A. Yes, it is.

Justice Stephens: How many more of these have you, Mr. Knuff?

Mr. Knuff: Well, I have quite a number more—

Justice Stephens: Then we might as well take our
3972 recess at this time.

(Thereupon, at 12:20 o'clock p. m., a recess was taken until 1:45 o'clock p. m. of the same day.)

3973 AFTERNOON SESSION

(The trial was resumed at 1:45 o'clock p.m., pursuant to recess.)

Justice Stephens: You may proceed.

Thereupon, GEORGE N. LENCI the witness on the stand at the time of recess, resumed the stand and testified further as follows:

Direct Examination (resumed)

By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked for Identification as Government's Exhibit No. 468, the same being a copy of a letter dated June 13, 1933, addressed to the Board Survey Company and signed G. N. Lenci.

(The document referred to was marked as Government's Exhibit No. 468 for Identification.)

By Mr. Knuff:

Q. Will you tell us whether the original of that letter was sent to the Board Survey Company? A. The letter, or rather, the body of the letter is a copy of a letter sent to the Board Survey Company. The memorandum at the top did not go to the Board Survey Company.

Q. That was put on for your own office information? A. That is an inter-office communication.

3974 Q. And who put that on? A. I dictated it.

Q. I show you what has been marked for identification as Government's Exhibit 469, the same being a letter dated June 15, 1933, addressed to the Ebsary Gypsum Company and signed Frank M. Miller.

(The document referred to was marked as Government's Exhibit No. 469 for Identification.)

By Mr. Knuff:

Q. Will you state whether you received that letter, Mr. Lenci? A. Yes.

Mr. Knuff: May it be admitted, Mr. Bromley, that that is Mr. Miller's signature?

Mr. Bromley: Yes.

By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked for Identification as Government's Exhibit 470, the same being a letter dated November 21, 1932, addressed to George N. Lenci and signed Edward H. Diegel, Sales Manager.

(The document referred to was marked as Government's Exhibit No. 470 for Identification.)

3975 Justice Jackson: Are we supposed to have a copy of that up here? Where does it fit in? That last exhibit, Exhibit 469, completed this last set.

Mr. Knuff: I am sorry. The Clerk has them. It is not the Clerk's fault, however, as I put those over there late today.

Mr. Johnston: I would like to remind the Court that we haven't seen any of those that he is offering now, and we want the privilege of looking at them before they are offered.

Justice Jackson: You are entitled to do that.

Mr. Knuff: I suppose that that is because I have been going so fast that I caught up with myself this morning.

Justice Garrett: Mr. Knuff, may I interrupt you here? This morning you began offering, here, with what number, I don't recall?

Mr. Knuff: Exhibit 447.

Justice Garrett: You began offering them for the purposes of identification.

Mr. Knuff: That is right.

Justice Garrett: You stated at that time that this witness was the one by whom these letters could be identified.

Mr. Knuff: That is correct.

Justice Garrett: And that they were not being
3976 introduced as evidence. You are not introducing them—as I understand it, you are not going to introduce them today as evidence?

Mr. Knuff: We have changed our opinion since I made that statement. We are going to introduce them today, Your Honor.

Justice Jackson: Do you have to get such a long, long list before you offer them all? Does that fit in with your plans? I am just wondering how we can keep them all in mind if there are separate objections made to several of them.

Mr. Knuff: They logically fall into three separate and distinct categories. One will begin with Exhibit 451 and will take in certain exhibits; then another category will begin with Exhibit 447 and end with 457, exclusive of 451—

Justice Jackson: (Interposing) Well, you can do your own grouping as you make the offer.

Mr. Knuff: That is what I intended to do, Your Honor.

Justice Stephens: We should know, however, whether you are marking them merely for identification or otherwise, because if you are marking them for introduction we must read them very carefully so we can understand them for the purpose of understanding objections.

Mr. Knuff: I didn't think we would reach them today.

Justice Garrett: So far, there has not been the
3977 slightest objection on the matter of identification. In fact, counsel for the defendants have agreed to the identification of signatures.

Now suddenly we are confronted with the proposition that you are going to introduce them as evidence. It is very trying to have to—it is all right, of course, if you are going to introduce them as evidence, but there could have been so much time saved by having them identified and then taking them as evidence at the same time.

However, proceed as you like.

Mr. Knuff: We have, I believe, only about two more to be marked, and then the three groups, as I have indicated, will be introduced.

By Mr. Knuff:

Q. Did you receive Government's Exhibit 470 for Identification from Mr. Diegel, Mr. Lenci? A. Yes.

Q. Mr. Edward Diegel is Sales Manager for the Ebsary Gypsum Company? A. Yes, my assistant.

Q. And generally, he is in charge of the sales of the Ebsary Gypsum Company, under your direction? A. Yes.

Q. He is not a local sales manager? A. No.

3978 Q. I show you what has been—

Justice Stephens: (Interposing) Just a moment. Since you are going to offer these, we will have to read each of them.

Mr. Knuff: Excuse me. I just have one more before I will offer the three groups in evidence.

(Exhibit 470 examined by the Court.)

By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked for Identification as Government's Exhibit 471, the same being a copy of a letter dated November 28, 1932, addressed to the Board Survey Company, signed Ebsary Gypsum Company, G. N. Lenci, Secretary.

(The document referred to was marked as Government's Exhibit No. 471 for Identification.)

By Mr. Knuff:

Q. Will you state whether or not that is a carbon copy of a letter the original of which was sent to the Board Survey Company? A. Yes.

Q. This morning, I asked you concerning a letter that you wrote to the Board Survey Company, dated August 16, the reply to which was marked Government's Exhibit 451.

Mr. Knuff: Will you please show Mr. Lenci that 3979 exhibit, please?

(Government's Exhibit 451 handed to witness.)

By Mr. Knuff:

Q. Do you have before you that letter, Government's Exhibit 451? A. I have the Board Survey letter of August 16, yes.

Q. Do you recall that this morning I asked if there were any further complaints sent to the Board Survey Company concerning the sale by any licensees to jobbers, and your reply was, as I recall it, that you didn't think there were any further complaints? Do you remember that? A. Yes; and didn't I follow that up, in response to a question from the bench, by saying—

Q. (Interposing) As I recall your testimony, you said the condition was corrected later that year or in the first part of 1933. A. Yes.

Q. Now do you have before you Government's Exhibit No. 471? A. Yes.

Q. In view of what you have before you now, do you care to make any change in your previous testimony? A. Well, we were still complaining up to as late as November of 1932.

3980 Q. Of 1932? A. Yes.

Mr. Knuff: Now, if Your Honors please, we offer in evidence Government's Exhibits 451, 470, and 471.

Justice Stephens: Since you stated that you were not offering these exhibits at this time, I didn't read two or three of them, because I didn't want to hold you up. I assumed if you offered them later I would have a chance to read them before then.

(Exhibits 451, 470 and 471 examined by the Court.)

Justice Stephens: Is there any objection to these exhibits? Have counsel for the defendants seen them?

Mr. Johnston: I am a little like counsel for the Government, I am getting so mixed up on these exhibits I don't know whether we have seen all of them or not.

Mr. Knuff: I am not mixed up.

Mr. Johnston: As I understand it, they are offering 451 but nothing before that; then they skip over to 470?

Justice Stephens: They are offering 451, 470, and 471. Just those three, now.

Mr. Bromley: We make the usual objection.

Justice Stephens: If there is no other objection, they will be received in evidence subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents referred to, marked as Government's Exhibits Nos. 451, 470, and 471, were received in
3981 evidence.)

Justice Stephens: The Court Reporter has kindly offered, the record may show, to save the Court the use of

so many words in this particular situation, and wherever the Court uses the phrase "the usual reservation", the Court Reporter will write out the entire statement that the Court has been using.

Mr. Knuff: I now offer in evidence Government's Exhibits 447, 448, 449, 450, 452, 453, 454, 455, 456, and 457.

Justice Stephens: That is 447 to 457, inclusive, serially?

Mr. Knuff: Yes, except 451, which has previously been offered in evidence and received.

Justice Stephens: Oh, yes.

There is attached to Exhibit 448, Mr. Knuff, a little slip which reads—a typewritten slip, attached to it by a staple—I can't quite see it all, but it reads—

Mr. Knuff: (Interposing) "Attached is a copy of USG's acknowledgment to our letter of May 6. This for your information. GNL."

Justice Stephens: And then there are two words at the top, the names of Ebsary and Hough.

Mr. Knuff: Yes.

Justice Stephens: Is that part of the exhibit?

3982 Mr. Knuff: Yes, Your Honor.

Justice Stephens: Were you aware of that when you identified it?

The Witness: Yes.

Justice Stephens: Is there an attached copy? Oh, I see. The little slip is an office memo, and 448 is the copy to which it refers.

Mr. Knuff: That is my understanding of it, Your Honor.

Justice Stephens: Is there any objection except the usual objection?

Mr. Bromley: I do not understand what the Government has in mind by grouping these exhibits as it has. Will the Government at some future time attempt to rely upon some inference that because I haven't said anything about it I admit that all these letters relate to one subject matter, or that they are complete with respect to one or more subject matters? Because I don't make any such admission. They are obviously incomplete. There are letters that are not here, and the letters as they are grouped by Government counsel have no understandable scheme, they don't relate to the same subject matter, they relate to a whole variety of different things. I don't know why he groups them this way, if he has any reason.

Mr. Knuff: I have a very definite reason for

3983 grouping them in this way.

In the first place, it was more convenient for us to

do it—at least, we thought it was more convenient for us to do it this way. And the letters relate to the policing of the industry, which is specifically charged in the complaint. There are various different types of policing.

Mr. Bromley: Well, is it your contention that these exhibits which you now offer in a group, relate to one type of policing?

Mr. Knuff: No, there are various types of policing in here, various phases of policing.

Mr. Bromley: I didn't understand that there was any issue in this case about policing, by the licensor, of the licensees' prices. I had supposed that that was admitted.

Mr. Knuff: It is the extent and character of the policing, and what they did pursuant to the policing.

Justice Stephens: Well, is there any objection except the usual objection?

Mr. Bromley: No, sir.

Justice Stephens: Then Exhibits 447, 448, 449, 450, 452, 453, 454, 455, 456, and 457 are received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents referred to, marked as Govern-
3984 ment's Exhibits Nos. 447, 448, 449, 450, 452, 453, 454, 455, 456, and 457, were received in evidence.)

Mr. Knuff: We now offer in evidence Government's Exhibits 458 to 469 inclusive.

Justice Stephens: Is there any objection except the usual objection?

Mr. Bromley: May I have just a minute, if the Court pleases?

Justice Stephens: Yes, certainly.

(Exhibits examined by defendants' counsel.)

Mr. Bromley: We make only the usual objection, but in making it I do not admit that these letters are either complete or relate to the same subject matter or to one or more subject matters. It seems to me that, again, they are hopelessly confused and mixed up and quite incomplete.

Justice Stephens: The exhibits are received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents referred to, marked as Government's Exhibits Nos. 458 to 469, both inclusive, were received in evidence.)

By Mr. Knuff:

Q. In 1932, Mr. Lenci, the Ebsary Gypsum Com-
3985 pany was selling board and lath to the Connecticut Adamant Plaster Company at a manufacturer's discount, is that correct? A. Yes.

Q. And before you could sell that board and lath to the Connecticut Adamant, you had to have USG's permission to do so, is that correct? A. Yes.

Q. And did you secure USG's permission to sell the Connecticut Adamant Plaster Company at a manufacturer's discount? A. Yes.

Q. The Connecticut Adamant Plaster Company is a plaster manufacturer located in New Haven, Connecticut, is it not? A. Yes.

Q. And they manufacture plaster and plaster products, but do not manufacture board? A. That is correct.

Q. And were you the supplier of that company's needs—or your company, rather, was the supplier of that company's needs for board and lath, is that correct? A. Only in a very small way.

Q. You didn't sell them their entire needs? A. Oh, no.

Q. They bought from other manufacturers than
3986 yourself? A. They did.

Mr. Knuff: May I have Exhibit 467, please?

(Government's Exhibit No. 467 handed to witness.)

Mr. Knuff: May I also have Exhibit 463?

(Government's Exhibit No. 463 handed to witness.)

By Mr. Knuff:

Q. The Board Survey Company had filed a notice or had written you a letter to the effect that the Connecticut Adamant Plaster Company was offering patented board, manufactured and sold by you, to the New Haven Reserve Supply Company and other New Haven dealers in quantity, at the licensor's minimum price to you; do you recall that? A. Yes.

Q. Now subsequent to receiving that letter, did you have an occasion to go to New Haven in connection with some other business that you had? A. Yes.

Q. And at that time did you see Mr. Kellogg, who was the principal stockholder of the Connecticut Adamant Plaster Company? A. Yes, I saw Mr. Kellogg.

Q. And did you ask Mr. Kellogg whether or not he was selling to the New Haven Reserve Supply Company at

prices less than dealer prices; do you recall that? A. My recollection is not absolutely clear on that.

3987 Q. Well, what is your best recollection? A. I would take it from my letter of June 13 that I did do that.

Mr. Bromley: I move to strike that answer out as merely a statement of conclusion.

Justice Stephens: Read the answer.

(The answer was read by the reporter.)

Justice Stephens: Do you have any recollection of doing it?

The Witness: Not an independent recollection.

Justice Stephens: It may go out.

Justice Garrett: I don't know whether it is important or not, but embraced in your question, Mr. Knuff, was the statement that Mr. Kellogg was the principal stockholder. That was embraced in your question. Were you testifying, or is that in evidence anywhere, or is it of any importance? You asked him if he had gone there to see about other business, and if he then talked with Mr. Kellogg, the principal stockholder. I don't know whether it is of any importance at all, but if so, have we any evidence that Mr. Kellogg was the principal stockholder?

Mr. Knuff: I don't think it would be seriously questioned. As I understand it, the Connecticut Adamant Plaster Company was a concern that was what you might call a family-owned concern; and Mr. Kellogg, who recently died,

3988 and who was the gentleman that I had reference to, I believe was the principal owner of the Connecticut Adamant Plaster Company.

Do you know, Mr. Lenci, whether Mr. Kellogg was an officer of the Connecticut Adamant Plaster Company?

The Witness: I believe that he was, and that was the reason I answered that question as I did, that I saw Mr. Kellogg.

I don't know whether he was the principal stockholder or not.

Justice Stephens: You should take pains, Mr. Lenci, when these leading questions are asked you which contain a recital of facts, if you don't understand or agree to that recital of facts to say so. Otherwise, we get matters in the record which ought not be in the record.

The Witness: Thank you.

Justice Garrett: Upon my own responsibility, and not on the responsibility of my associates on the Court, I would

like to ask this: We are dealing with these letters now, many of them to the Board Survey Company. The witness stated earlier in the day that the Board Survey Company—I think I quote the idea, though probably not his language, accurately—was a subsidiary of USG. For my information, I would like to know if it was a subsidiary of USG or if it was an organization formed after these licenses had
3989 been taken, and was an organization in which every licensee had an interest? I suppose it took some money to support it. Did the licensees support it or contribute to it, or was it purely a subsidiary of USG?

Mr. Bromley: Well, it was an agency of USG, all of the stock of which was owned by USG, and the money to run which was loaned to it by USG. The licensees had no interest in it whatsoever. It was formed after the licenses were taken for the purpose of bringing about compliance with the licenses in situations where one licensee would complain against another. It was set up as a separate organization, really a separate department of USG, and its sole function as a corporation was to receive complaints of license violations by licensees, from other licensees; investigate them, and call them to the attention of the offending licensee.

Justice Stephens: Is that the understanding of the Government?

Mr. Knuff: Well, it is my understanding that the Board Survey Company was a wholly-controlled agency of the United States Gypsum Company, and that they did receive complaints. I will go along that far with Mr. Bromley's statement.

Mr. Bromley: I think the reason for it was that the licensor didn't feel that complaints ought to be handled by its own sales department, which was in active competition for business with these licensees; and that it would
3990 be fairer if it could get an organization that had some element of impartiality in it, and was completely divorced from USG's own sales activities.

Justice Stephens: Now, you seem to halt, Mr. Knuff, at agreeing that the licensees had no interest in it. Do you claim that they had a financial interest in it?

Mr. Knuff: I don't believe that the licensees had any interest in it at all. I think that the financial interest was entirely in the USG Company. I don't think any of the licensees had any financial interest in it.

Justice Garrett: These exhibits that you are now offering, and which have been offered and received in evidence,

and the examination which you are now proceeding with, relate to this so-called policing that is referred to here in the complaint, and one instrumentality, at least, of what you charge, was this Board Survey Company; is that correct?

Mr. Knuff: That is correct, Your Honor.

Justice Garrett: And that was entirely a subsidiary of USG, and the licensees had no interest in it and contributed nothing to its support—it was not, in other words, a creation of the licensees after taking the licenses?

Mr. Knuff: I don't know how it was created. I don't think the licensees had any financial interest in it. I think the licensees had an interest—not financial, how-
3991 ever—in the maintaining of the policing agency, but I don't believe they had any financial interest in it at all.

Justice Garrett: All right.

Mr. Bromley: Or any stock interest.

Mr. Knuff: Or any stock interest,—I don't believe they did, but I don't know. Maybe Mr. Lenci could enlighten us as to his company.

Justice Garrett: Was that incorporated, Mr. Bromley?

Mr. Bromley: It was an Illinois corporation, formed after the licenses were signed.

Justice Stephens: What you mean, I suppose, Mr. Knuff—if I don't state this correctly you are at liberty to disagree—is that you claim the licensees had an interest in such an agency as the Board Survey Company being in existence and carrying on its activities because it was in the interest of the licensees, and each of them, that there should not be violations of the licenses by others?

Mr. Knuff: Yes, I would agree heartily with that statement.

Justice Jackson: That is really obvious, isn't it?

Mr. Knuff: I thought it was.

Mr. Bromley: What we said about it, at the time we formed it, is contained in Exhibit 432, a letter of March 4, 1932, which Mr. Henning wrote to the Ebsary Gypsum Company.

Justice Garrett: I read that, but it didn't explain
3992 it quite fully enough for me to thoroughly understand it.

Justice Stephens: You may proceed.

By Mr. Knuff:

Q. I wonder, Mr. Lenci, if your recollection could be refreshed as to how you received your information concerning the sales of Connecticut Adamant Company to the New Haven Reserve Supply Company. Do you think it could be refreshed? A. It might be, yes.

Q. I would like to have you read your testimony that you gave at the trial in the District Court here on the 20th of October, 1941, beginning at the bottom of page 558 and going over to the middle of page 560.

(The testimony referred to was handed to the witness.)

Justice Stephens: While the witness is reading that, will you read me Mr. Knuff's question, please?

(The record was read by the reporter.)

The Witness: Yes, I have read it.

Justice Stephens: Mr. Marshal, hand to counsel, and then let us see, the testimony referred to.

Justice Jackson: I think counsel have their own copies.

Justice Stephens: All right, let us see it, then.

(The testimony referred to handed to the Court.)

Justice Stephens: What pages is this between?

Mr. Knuff: From the bottom of page 558 to the
3993 middle of page 560.

By Mr. Knuff:

Q. Since reading this testimony, has your memory been refreshed, Mr. Lenci? A. Yes.

Q. Did you go up to New Haven? A. I went to New Haven, as I said before, to see Mr. Kellogg, regarding gypsum block. We were selling gypsum block to the Connecticut Adamant Company. That is a different product entirely. And I believe in the course of the conversation—

Mr. Bromley: (Interposing) I object to what he believes, if Your Honor please.

By Mr. Knuff:

Q. When you say "believe", do you mean by that that that is your best recollection? A. My present recollection is that I asked Mr. Kellogg if he were selling the New Haven Reserve Supply Company.

Q. And what did Mr. Kellogg tell you? A. He said no.

Q. At the top of Exhibit 468, I believe you testified that you dictated the memorandum that appears on the top of that exhibit, and that what is dictated there did not appear on the original; is that correct? A. Yes.

3994 Q. Will you just tell the Court what is meant by that memorandum, please?

Justice Stephens: Let us hear what it contains, first. Since it is in evidence, it is all right to read it. We can't see it the way these exhibits are bound. Read it to us, will you, please?

The Witness: It is addressed to E. H. Diegel. "Please note reply. You will note that I have avoided making a justification of the right of the Connecticut Adamant to sell any quantity at the carload price as I feel that it will weaken our case against the Paragon and American Hardwall. They only asked us how Connecticut Adamant could resell our board at the dealer's price, and this I have explained."

By Mr. Knuff:

Q. Will you explain what you meant by "weakening your case against the Paragon and American Hardwall"? A. At the present moment, I can't remember just what that was.

Q. Well, did it have reference to the trucking situation around Syracuse, the trucking area? A. I don't remember exactly what it was.

Q. What is the reference to the carload price there, what does that mean? A. Well, the Board Survey Com-

3995 pany's inquiry was—how could our board be sold by the Connecticut Adamant Company to the New Haven Reserve Supply Company if we were not selling the Connecticut Adamant Company at less than the dealer's price, and in making that inquiry they had overlooked the fact that they had granted us the right to sell the Connecticut Adamant Company as a manufacturing distributor.

Q. You had previously called their attention to that fact, had you not? A. Yes, but apparently they had forgotten it.

Q. Well, what is the meaning of "sell any quantity at the carload price"? I just don't understand what you mean by that. A. Well, they couldn't understand how the Connecticut Adamant Company could pay us the full dealer's price, f.o.b. cars New Haven, and resell it to anyone else at the dealer's price, which would represent no profit, having forgotten that the Connecticut Adamant Company at that

time was either getting the 10 percent or the 12-1/2 percent manufacturing distributor's discount.

Q. And you say that the Board Survey had overlooked the fact that you had the licensor's permission to sell them at a discount? A. Yes.

Q. And how would that fact weaken any case that
3996 you had against Paragon or American Hardwall, if you recall? A. I have been trying to place that in my mind, and honestly I can't remember.

Q. Maybe we can stir up some of the embers of your memory.

The Paragon Plaster Company, and the Paragon Plaster & Supply Company, and American Hardwall Plaster Company, were the three owners of Oakfield Gypsum Products Corporation; is that correct? A. I can't say that they were the three owners. They were interested in the ownership.

Q. They were interested in the ownership? A. Yes.

Q. Does the fact that they were interested in Oakfield revive your memory to any extent? A. No; I know that, I know that.

Q. I show you, Mr. Lenci, what has been marked for Identification as Government's Exhibit 472, the same being a letter dated July 29, 1929, addressed to George N. Lenci, and signed C. F. Henning, Vice President in Charge of Sales—and then opposite and below the "g" in Mr. Henning's name is a small "m".

(The document referred to was marked as Government's Exhibit No. 472 for Identification.)

3997 By Mr. Knuff:

Q. Was that letter received by you, Mr. Lenci? A. I think it was, there is nothing on it to identify it.

Q. You supplied that to us from your files? A. Yes.

Mr. Knuff: I wonder, Mr. Bromley, if it can be stipulated that the signature to the letter was an authorized signature?

Mr. Bromley: I don't know anything about it.

Mr. Knuff: It is definitely not Mr. Henning's signature, I can see that.

By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked for Identification as Government's Exhibit 473, the same being a letter dated March 26, 1930, addressed to George N. Lenci

and signed C. Henning, Vice President in Charge of Sales. Was that letter received in your office? A. Yes.

(The document referred to was marked as Government's Exhibit No. 473 for Identification.)

By Mr. Knuff:

Q. I show you what has been marked for Identification as Government's Exhibit 474, the same being a letter dated March 4, 1931, addressed to George N. Lenci, Vice
3998 President, and signed C. Henning, Vice President in Charge of Sales.

(The document referred to was marked as Government's Exhibit No. 474 for Identification.)

By Mr. Knuff:

Q. Was that letter received in your New York office? A. Yes.

Mr. Knuff: In the books of exhibits that are now before Your Honors, you will find that the next exhibit is dated March 17, 1931. Just skip that for the time being, please.

By Mr. Knuff:

Q. I show you what has been marked for Identification as Government's Exhibit 475, the same being a letter dated June 4, 1936, addressed to George N. Lenci and signed C. Henning, Vice President.

(The document referred to was marked as Government's Exhibit No. 475 for Identification.)

By Mr. Knuff:

Q. Was that letter received by you? A. Yes.

Q. I show you what has been marked for Identification as Government's Exhibit 476, the same being a letter dated February 7, 1936, addressed to George N. Lenci, and
3999 signed C. Henning, Vice President in Charge of Sales.

(The document referred to was marked as Government's Exhibit No. 476 for Identification.)

By Mr. Knuff:

Q. Was that letter received by you? A. Yes.

Mr. Knuff: We now offer in evidence Government's Exhibits 472, 473, 474, 475, and 476.

Justice Stephens: Is there any objection on the grounds of identification as to any of them?

Mr. Johnston: We haven't had an opportunity to go over them.

Justice Stephens: Take your time, gentlemen.

(Exhibits examined by defendants' counsel.)

Mr. Bromley: We make only the usual objection.

Justice Stephens: There is no objection as to identification of any of them, even 472?

Mr. Bromley: No, sir.

Justice Stephens: They may be received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents marked as Government's Exhibits 472, 473, 474, 475, and 476 were received in evidence.)

4000 By Mr. Knuff:

Q. The five exhibits that you have just identified, Mr. Lenci, relate to meetings that were held on the days specified, and were what might be designated as meetings of licensees; is that correct? A. Yes.

Q. The dates on which these meetings were held were not the only dates on which meetings of licensees were held, is that correct?

Mr. Oliver: We object to that question on the ground that it assumes that the witness has testified that meetings were held on these dates. I recognize that the letters are notices of such meetings, but that is all.

Mr. Knuff: I will clear that up.

By Mr. Knuff:

Q. Were meetings held on those dates, if you know? A. I don't know.

Q. You received the notices of the meetings? A. We did.

Q. Did you receive notices of meetings other than those notices? A. I can't recall.

Q. Did you attend a meeting on August 6, if you know?

Mr. Bromley: What year?

Mr. Knuff: 1929.

4001 The Witness: I don't recall.

By Mr. Knuff:

Q. Did you attend a meeting on April 3, 1930? A. I don't remember.

Q. And did you attend a meeting on March 10, 1931? A. No.

Q. And did you attend a meeting on June 10, 1936? A. I don't remember.

Q. Did you attend a meeting on February 19, 1936? A. I don't remember.

Q. Did you attend any licensee meetings? A. Yes.

Justice Stephens: Did I understand you to say that you did not attend one on March 10, or that you didn't know?

The Witness: I did not attend the March 10th meeting.

Justice Stephens: If there was one then, you didn't attend it?

The Witness: That is right.

By Mr. Knuff:

Q. Was there a meeting held in the Commodore Hotel on October 17, 1932, if you know?

Justice Jackson: At the Commodore Hotel in New York?

Mr. Knuff: In New York City, yes.

The Witness: I don't remember.

By Mr. Knuff:

4002 Q. Could your memory be refreshed as to that? A. Yes.

Q. I show you, sir, what has been marked for Identification as Government's Exhibit 477, and I ask you to look at it, please.

(The document referred to was marked as Government's Exhibit No. 477 for Identification.)

Justice Stephens: That consists of three pages—

Mr. Knuff: (Interposing) The October 17th meeting is just one page, Your Honor.

Justice Stephens: I see. They are differently dated. What number is this going to be?

Mr. Knuff: Exhibit 477.

By Mr. Knuff:

Q. Have you looked at Government's Exhibit 477 for Identification, Mr. Lenci? A. Yes.

Q. Does that refresh your recollection as to whether or not you attended a meeting of licensees in the Commodore

Hotel on the 17th of October, 1932? A. Yes, I did attend that meeting.

Q. And the exhibit that you have before you is a memorandum in your own handwriting, is that correct? A. That is correct.

4003 Q. And when was that made, Mr. Lenci? A. Very shortly after the meeting.

Q. The same day or the next day? A. Within the next two or three days.

Q. Within the next two or three days? A. Yes.

Q. Who was present at the meeting on the 17th of October, 1932? A. For the United States Gypsum Company—

Q. (Interposing) Who represented them? A. Mr. Henning and Mr. MacLeish.

Q. Was Atlantic represented? A. Atlantic Gypsum Company was represented by Mr. Neale.

Q. Was the Kelley Plasterboard present at that meeting, or represented, rather? A. The Kelley Plasterboard Company was represented by Mr. Kelley.

Q. And was the Ebsary Gypsum Company represented? A. We were represented by Mr. Ebsary, Mr. Hough, Mr. Diegel, and myself.

Q. You had four there? A. Yes, it was in our own home town.

Q. And was National represented at that meeting? A. Yes, National was represented by Mr. Baker.

4004 Q. That is Mr. M. H. Baker? A. Yes.

Q. The President of National? A. Yes.

Q. And was Certain-teed represented at that meeting? A. Yes, by Mr. C. O. Brown and Mr. Roos.

Q. And was American represented at that meeting? A. American was represented by Mr. Black.

Q. That is Arthur Black? A. Arthur Black.

Q. And was Universal represented? A. Universal was represented by Mr. Eugene Holland.

Q. Texas was not at that meeting, is that correct? A. I have no record of Texas being there.

Q. How long did the meeting last? A. Well, just that one day. I don't remember whether it lasted a morning and afternoon, or just a single session. I don't remember.

Q. You don't remember whether it started in the morning and finished later in the afternoon, or whether it was an afternoon session and finished late in the afternoon—your recollection is not sufficiently clear as to that? A. No.

Q. At that meeting, was there any discussion as to the results of an audit that the United States Gypsum
4005 Company had made of the books of the various licensees some time previous to that? A. Yes.

Q. And who led that discussion? A. Well, as I recall it, the meeting was called as the result of the audit.

Q. Do you know who called the meeting? A. Well, the United States Gypsum Company called it.

Q. United States Gypsum? A. Yes. And as I remember, Mr. MacLeish had a record of the audit that had been made, and he was very much perturbed at the number of violations of the terms of the license bulletins.

Q. And did Mr. MacLeish point out that American had allegedly violated their agreement in 361 different ways, involving $45,000, which represented about 4 million feet of board? A. No, Mr. MacLeish did not use any names.

Q. He didn't use any names? A. He did not use any names. We knew our own when we came to the figure, because we had already been given a copy of our audit.

Q. I notice that on Exhibit 477, you have noted "1", "2", "3", and so forth, and then on the outside of that margin you have indicated "2", "5", "4", "6", "3", "1", and
4006 "7", and I was just corresponding— A. (Interposing) That was purely in the realm of speculation on my part.

Q. That was just speculation on your part? A. Yes.

Q. You were No. 4, is that correct? A. I was No. 4, yes.

Q. And according to Mr. MacLeish, the Ebsary Gypsum Company had allegedly violated the licensing agreement 711 times, to the extent of $50,000, and involving about 6,700,000 feet of board; is that correct? A. That is correct.

Q. Is that your recollection as to that? A. I remember the 711.

Q. Did Mr. MacLeish say what possible alternatives there were in case the situation didn't improve? A. Yes, he made the statement that if the situation did not improve, there were only three things to do: either to cancel the licenses; or for the United States Gypsum Company to institute damage suits against the licensees; or to eliminate the price control feature entirely from the licenses.

Q. Was there any discussion by any of the licensees as to what course of action USG should pursue? A. No.
4007 Q. That was just a statement made by Mr. MacLeish, that there were three things open for the licensor: either to cancel the license, or to bring an action for

damages, or to waive the price control feature in the license agreements? A. That is correct.

Justice Stephens: We will take the afternoon recess at this time.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

4008 Justice Stephens: Proceed.

By Mr. Knuff:

Q. At this meeting of October 17, 1932, Mr. Lenci, after Mr. MacLeish had said that the United States Gypsum Company had three courses to pursue, that is, either to cancel the agreement, bring an action for damages, or to remove the price control feature from the licenses, what expression of opinion did any of the licensees make as to that statement of Mr. MacLeish's?

Mr. Bromley: I object to that as repititious. He has already said, "None".

Mr. Knuff: I didn't so understand him.

Justice Jackson: Is that right?

The Witness: Yes, we were just told what they would do if we didn't behave ourselves.

By Mr. Knuff:

Q. What was that, you were told what would happen if you didn't behave yourselves? A. We were told that if we didn't improve this condition they would take either one of these steps.

Q. Did you use the word "behave"? A. Maybe I did.

Mr. Knuff: Will you read the answer, Mr. Reporter?

(Thereupon, the record was read by the reporter.)

The Witness: That is my wording and not theirs.

4009 By Mr. Knuff:

Q. That is the way you understood their language, is that correct? A. To put it more correctly, we were told that we would have to abide by the license and the license bulletins, or that otherwise they would take one of these three courses of action.

Q. Your license wasn't cancelled, was it? A. No.

Q. And USG didn't bring a suit against Ebsary Gypsum Company for damages, did they? A. No.

Q. And the price control feature of the license wasn't abrogated in so far as Ebsary was concerned? A. No.

Q. Do you know of the license of any other licensee that was cancelled after this meeting? A. No, I don't know of that.

Q. Do you know of any lawsuit brought by USG for contributory infringement of the patent, after this meeting, against any other licensee? A. I don't know of that.

Q. Do you know of any license having the price control feature removed after this meeting of October 17? A. I do not know that.

Q. Now at this meeting there was a discussion con-
4010 cerning low prices, is that right? A. No, that was not a discussion, that was part of Mr. MacLeish's statement.

Q. What was his full statement? A. He gave us first the tabulation of the results, and then following that he said, "These violations fall into these various classifications".

Q. What were those classifications? A. They were low prices—do you want me to explain this as I go along? There is no point in my reading them all off and then going back to them again.

Q. I want you to explain, Mr. Lenci, your present recollection of just what Mr. MacLeish said at that meeting, and you can use the exhibit that you have before you marked for identification as Exhibit 477, to refresh your recollection. A. Well, the first item was low prices. That was very simple to understand. Those were prices at which board products had been sold at less than the bulletin prices.

Q. Yes? A. The next item is old prices—

Justice Stephens: (Interposing) Are you telling us what Mr. MacLeish said?

The Witness: Yes, not in his words, though.

Justice Stephens: I understand.

4011 By Mr. Knuff:

Q. Did Mr. MacLeish indicate what he meant by "low prices"? A. Yes, prices below the bulletin prices.

Q. I see, prices that were below the minimum prices fixed in the bulletins? A. Yes.

Mr. Bromley: Could we have it stated—prices by whom?

The Witness: By the licensees.

By Mr. Knuff:

Q. Did he discuss the extent of the low price variations, that is did Mr. MacLeish discuss that? A. No, there was no breakdown given.

Q. If I understand you correctly, he simply undertook to catalog the various violations into certain sub-heads, is that correct? A. That is correct, yes.

Q. And in that catalog, or as one of the headings in that catalog, there was the subject of prices that were below the minimum price established by the United States Gypsum Company? A. Sales by the licensees at prices below those established in the bulletins.

Q. Did he talk about what the old prices were? A. Well, a great many of these violations fell into this classi-
4012 fication because the audit started with the date of the very beginning of the price control.

Q. That was in May of 1929? A. May of 1929—and consequently, there were a great many orders on all of the companies' books at prior prices, and those naturally were below the bulletin prices, or a great many of them were below the bulletin prices, which were in effect after the licenses were granted.

Q. Are you explaining what is meant by "old prices", or are you relating what Mr. MacLeish said? A. That is what he said.

Q. That is what he said? A. Yes.

Q. In other words, Mr. MacLeish was excusing the low prices, is that correct? A. He understood what they were.

Q. He understood that? A. Yes. The accountants, in making their audit, made no attempt to edit the matter at all, they simply made a transcript in their own form, of the figures.

Q. Did Mr. MacLeish talk about the excessive discounts, the alleged excessive discounts? A. He did. I have just forgotten what that discussion was. I don't remember just what that was.

Q. Was there any discussion by Mr. MacLeish as
4013 to rebates, that is, that a licensee would sell board at a price, and then make a rebate to a customer later on? A. I have forgotten just what that discussion was.

Q. There was some discussion concerning rebates? A. When I say "discussion" I mean that Mr. MacLeish made some statement regarding that, but I have forgotten what it was—

Q. (Interposing) Had you finished your answer? A. I have forgotten just what it was.

Q. Did Mr. MacLeish discuss the matter of culls in the industry? A. Yes.

Q. What is the meaning of the term "cull"? A. Well, a cull is a board which is not fit for sale, fit for use.

Q. It is an imperfect board? A. It is an imperfect board, and they were used for dunnage.

Q. And what did Mr. MacLeish say about that? A. That some of the complaints were due to the fact that the licensees were putting in an unusual number of boards as culls, for packing, which in reality were first-class material and in a way were a rebate.

Q. And did Mr. MacLeish say that that practice
4014 would have to cease? A. Yes.

Q. Now what about seconds, was there any talk about seconds there? A. No, I don't think so.

Q. Would you say that seconds were the same as culls? A. No.

Q. They are not the same as culls? A. No.

Q. What is the difference between a second and a cull? A. Well, a second is a poor board which is usable, but an honest cull is no good for use in building.

Q. That is an imperfect board that hasn't any use— A. (Interposing) That hasn't any use, yes.

Justice Jackson: It is so imperfect that it hasn't any use?

The Witness: That is right.

By Mr. Knuff:

Q. And a second is an imperfect board that can be used? A. That is right.

Q. Did Mr. MacLeish discuss the advertising policies of the various licensees? A. Yes.

Q. What did he say about that? A. The complaint was that at that time a great many of the dealers were demanding that the licensees buy advertising matter, or
4015 paint fences for them, or decorate their offices, or furnish materials with which to fix up their offices, and things of that kind—

Q. (Interposing) And Mr. MacLeish— A. (Continuing)—without charging for it.

Q. Let me understand you. Some of the dealers had been asking the licensees to defray the cost of billboards, is that what you mean? A. Yes, among other things.

Q. And some of the licensees were doing that? A. That had been done to an excessive extent which was, in effect, again a rebate.

Q. That is what Mr. MacLeish said? A. Yes.

Q. And did Mr. MacLeish say that that advertising policy would have to be corrected? A. Yes.

Q. Now suppose a dealer wanted to advertise Ebsary Gypsum Company's products in a newspaper, would you be

allowed, under your understanding of what transpired at the meeting of October 17, 1932, to defray any of the cost of that advertising? A. I don't remember that that sort of advertising came up for discussion.

Q. That wasn't discussed? A. No.

4016 Q. It was just billboard advertising, and the painting of dealers' offices, and what other kind of advertising was discussed? A. Well, those were the principal items. A dealer would decide that he wanted to repaint his whole place, fences and everything else, and on the fence there would be a small sign of one of the manufacturers, but the manufacturer would have to spend the money to do the whole job.

Q. And it was Mr. MacLeish's thought that that was, in effect, a rebate, is that correct? A. Yes.

Q. How about carpenters' aprons, were they discussed by Mr. MacLeish at that time? A. I don't think they were.

Q. They weren't discussed? A. I don't recall that they were.

Mr. Knuff: That isn't meant to be facetious. Later on we will show something concerning carpenters' aprons.

By Mr. Knuff:

Q. Was there anything said by Mr. MacLeish as to the freight that might have been deducted from bills rendered the dealers? A. No, that isn't what that memorandum on here means. It means that in making up—

Justice Stephens: (Interposing) State what Mr.

4017 MacLeish said, if anything.

The Witness: That is what I am trying to do—that the licensees, in figuring their delivered prices, did not use the proper freight rate from the mill to destination, which resulted in making a lower delivered price than should have been made.

By Mr. Knuff:

Q. Was there any discussion as to switching charges? A. Yes.

Q. What was the discussion that Mr. MacLeish brought up? A. The statement there was that in certain cities the cars would be placed for two different yards to unload, and the Interstate Commerce Commission would provide a switching charge for that service; and that that should not be absorbed by the shipper, or the licensee.

Q. If I understand you correctly, on a car coming into Washington, a pool car coming into Washington, D. C., con-

signed to two different consignees, under the tariffs of the railroad company there is a switching charge for moving the car after it is first placed, is that correct? A. That is my understanding, yes.

Q. And Mr. MacLeish told the licensees that if any of the licensees were absorbing that switching charge, that that was improper under the license? A. Yes, that in effect it reduced the price.

4018 Q. And did Mr. MacLeish say that that practice would have to stop? A. That that would have to be corrected, yes.

Q. Now do the railroads charge anything, in addition to the regular rate, on a stop-over car? A. Yes, that again applies to pool cars.

Q. What is meant by a "stop-over" car, first? A. Well, using this as an example, suppose a car is shipped from Philadelphia to Washington, but contains material for a dealer in Baltimore, which is an intermediate point. The railroad, for what is known as a "stop-over charge" will permit that car to be stopped in Baltimore for partial unloading, and then continue on to the ultimate destination.

Q. And some of the licensees had been paying that stop-over charge, is that correct? A. That is correct.

Q. And Mr. MacLeish said that that practice would have to stop? A. Yes.

Q. Now was there anything discussed concerning warehousing? A. As to warehousing, that has reference to cases where a licensee would make an arrangement with a dealer, and pay that dealer a warehousing charge, which merely was a cover for paying that dealer to buy his material, in effect a rebate.

4019 Q. According to Mr. MacLeish? A. Yes.

Q. If you wanted to rent warehouse space in, let us say Brooklyn, to warehouse your board, you were not permitted, under the license bulletins, according to your understanding, to rent that space from a dealer? A. No, and we wouldn't want to do it either.

Q. Well, in the first place, you weren't permitted to do it under the license bulletins? A. That is correct.

Q. According to your understanding? A. Yes.

Q. That is your understanding? A. That is my understanding, yes.

Q. If you wanted to warehouse your board in Brooklyn you would have to patronize some person other than one of your patrons, according to your understanding? A. Not necessarily other than one of our patrons, but we could not

patronize any building supply dealer who might be a customer of any licensee.

Q. What was the business reason for that, Mr. Lenci? A. The reason for that would be that if you were anxious to influence your sales to a specific dealer, you could go to that dealer and say, "I will pay you $50 a month", or "I will pay you $100 a month if you will put my material in
4020 stock", and theoretically somebody else would come and pick it up.

Q. Well, suppose you wanted to, bona fide, rent warehouse space, what was the business reason for preventing you from renting warehouse space as you understand it? A. Because the thing was not for the purpose of renting space, it was done for the purpose of influencing sales.

Q. Now my question asked concerning a bona fide warehouse arrangement. Suppose you wanted, honestly, without any thought of making a rebate, to warehouse goods in Brooklyn. What was the business reason why you couldn't rent warehouse space from a dealer, if there was any business reason, according to your understanding?

Mr. Bromley: Do you contend there is anything in the bulletins that would prevent a bona fide transaction, as distinguished from a fake or false rebate transaction, from being consummated?

Mr. Knuff: We do.

Mr. Bromley: Well, there wasn't, and the bulletins already in evidence show that.

Mr. Knuff: There is a blanket order under those bulletins, a blanket prohibition under those bulletins, that is quite apparent if you will examine the bulletins. We will bring that out later on and show the blanket prohibition against renting warehouse space from a dealer.

Justice Jackson: We will read the bulletins, I suppose.

4021 Mr. Knuff: That is right.

Justice Stephens: It seems to the Court that perhaps we could save some time here. No objection is being raised to your asking this witness his understanding of the bulletins, but doesn't the last question really become argumentative? Isn't it one for argument as to what the bulletins mean, and as to what they may or may not prevent?

Mr. Knuff: I didn't think it was, but if your Honor thinks so, I won't pursue it any further because we are going to develop it in just a little more orderly fashion, later on.

Justice Stephens: Very well.

By Mr. Knuff:

Q. There was a discussion at that October 17th meeting concerning jobbers, was there not? A. Yes.

Q. What was that discussion? A. I don't remember. There were so many discussions regarding jobbers, that I don't know.

Q. You mean that the matter of jobbers, the subject of jobbers, was a matter of very frequent discussion between licensees and the licensor? A. Well, you can see that from the letters that we had here this morning.

Q. I referred to two letters this morning. A. Yes.

4022 Q. Do you say that it was a matter of frequent discussion, the jobber situation? A. Yes.

Q. And you cannot tell us what the discussion was at this meeting of October 17, with reference to jobbers? A. Well, as I recall it, my best recollection is that the discussion was that a bulletin had been issued which put jobbers and dealers on the same basis, but that in spite of that, some of the licensees had continued to sell jobbers at a discount below the dealer price.

Q. And was there a discussion at that meeting that the manufacturers should discontinue that practice? A. I don't think that there was a discussion of it, I think Mr. MacLeish made a statement that it was one of the things that would have to be corrected.

Q. That the jobbing situation would have to be corrected? A. Yes.

Q. And that the licensees would not be permitted to sell a jobber at a discount? A. They would have to sell jobbers according to the bulletins.

Q. Which means that they wouldn't be able to sell them at a discount? A. Yes.

Q. Was there any discussion concerning the freight

4023 rates at that meeting? A. Well, I think the discussion on freight rates there is the same as I have already explained.

Q. That is, with reference to your using too low a freight rate or absorbing the switching charge, or paying the stop-over charge? A. Primarily in not using the correct freight in figuring the price to destination.

Q. Could it also mean using a wrong basing point? A. No.

Q. Not a wrong basing point? A. No.

Q. Was there any discussion concerning the freight and allowances at that meeting? A. There is no "and" in my

notes, that is a "t". It is "freight allowances". I don't recall just what that was.

Q. Do you recall that there was some discussion concerning freight allowances? A. Yes, otherwise I wouldn't have made the memorandum, but I don't remember what it was.

Q. Was there any discussion concerning the f. o. b. mill price? A. I don't remember what that was.

Q. You don't recall that? A. No, I don't.

4024 Q. Do you recall that Mr. MacLeish brought up the fact that at the Fair at Chicago, the National Gypsum Company had accepted some of the World's Fair bonds in payment for goods that were sold out there, and that Mr. MacLeish said that that practice would have to stop, that you could only sell for cash. Do you recall that? A. I do remember something of that kind, yes.

Q. Do you know how much material the National Gypsum Company sold to the Chicago World's Fair? A. No, I don't.

Q. And do you know what justification National Gypsum Company gave for their action in accepting these World's Fair bonds? A. No, I don't.

Q. But Mr. MacLeish was rather insistent that that practice should not continue in the future, is that correct?

Mr. Bromley: Just a moment. That assumes that he said anything about it. The witness says he doesn't remember.

Mr. Knuff: He says that there was some discussion about that, but that he does not recall just exactly what the discussion was.

Justice Stephens: Well, of course under Rule 43 (b) you are entitled to lead the witness, but even in leading the witness, you may not assume facts not in evidence. You

4025 may interrogate the witness as to what Mr. MacLeish did say on that subject, if he remembers anything.

Mr. Knuff: I will limit my question in accordance with your Honor's suggestion. What was my question?

Justice Stephens: Re-ask the question. Ask what Mr. MacLeish said, if anything, on this subject of taking bonds in payment for material by National. Answer that question.

The Witness: I don't really remember.

By Mr. Knuff:

Q. You don't recall what it was? A. No, I remember that the statement was made by Mr. MacLeish, but as to what the details were, I really don't remember.

Q. Well, do you recall whether Mr. MacLeish said that that practice couldn't continue in the future, that it would have to stop? A. I don't remember.

Q. Was there a discussion at the October 17th meeting concerning commission men being employed by the licensees? A. There weren't really any discussions on these matters. These were all statements made by Mr. MacLeish, that such-and-such a violation fell into this class or into that class. And he said, to go back, that the question of rebates came about through the employment of men selling on commission, and that the audit showed that these commission men, if they didn't have a good month, would be
4026 very apt to give part of their commissions away to the customer, and that therefore the employment of commission men was a bad practice.

Q. That the employment of commission men was a bad practice? A. Was a bad practice, yes.

Q. And that that practice would have to cease? A. That that would have to be discontinued.

Q. Now I get the impression—I don't want to get it erroneously—but I do get the impression from what you have said that Mr. MacLeish was the only person that did any talking up there, and that the licensees just sat there and didn't say anything. Am I wrong in that impression? A. No, I wouldn't say that, but the whole meeting was to present this audit, and Mr. MacLeish's or the United States Gypsum Company's reaction to the audit, and to explain what caused the differences, and to suggest methods to improve conditions.

Q. And when Mr. MacLeish said it was a bad practice for the industry to employ salesmen on a commission basis, what did the other members who were present at that meeting, say about that? A. Well, there were very few commission men employed, and the ones who had them said that they would be glad to rearrange them and put them on a salary basis.

Q. You say that there were very few commission
4027 men, commission salesmen, employed in the gypsum industry? A. Yes.

Q. And the licensees that did employ commission salesmen said that they would be very glad to discontinue their employment, that is the employment of commission men, and put the commission men on a salary basis? A. Yes.

Justice Jackson: Mr. Knuff, is it necessary that you repeat the answer to the question, just to have him say "yes"?

Mr. Knuff: No, I don't think so.

Justice Jackson: You have been doing that. I think on actual check yesterday you did it thirty-two times, and you have been doing it all day today. You are piling up a tremendous record, and the witness' answers are his answers. Then if you repeat his answers to him, and say, "Is that right?" that doesn't add anything to the strength of his answer.

Mr. Knuff: I quite agree with your Honor, and I was not conscious that I was doing it, and will try not to do it in the future.

Justice Stephens: We don't want you to be self-conscious, we want you to be at ease in this examination. We all have our individual methods. But it is a fact of which we have all been aware for several days, that you have been following the practice that Judge Jackson has just
4028 spoken of, and in the course of ten days' examination, it does take a lot of time and energy.

Mr. Knuff: I accept that as a criticism that is worthwhile, and I will try to correct it. I wasn't conscious that I was doing it.

Justice Stephens: We all fall into habits, of which we are not aware.

Justice Jackson: If we were in your place, we probably wouldn't do as well as you are doing.

Mr. Knuff: Well, I am not so sure that you probably wouldn't do better.

By Mr. Knuff:

Q. Now was there any discussion as to meetings of licensees that were to be held in the future? A. Well, in the period from 1929 to 1932 there had been a tremendous number of bulletins issued, piecemeal, and honestly none of us could be blamed for making mistakes. Mr. MacLeish said that the only way to handle that would be to have meetings a little more frequently, and that when these different misunderstandings as to the meaning of a bulletin came up, we should get them straightened out at these meetings, instead of going on and creating a record such as we had been doing in the previous three years.

Q. And was there anything said concerning a more comprehensive return that the licensees should file with
4029 the royalty statements? A. Yes. I believe up to that time the statements had been very brief, and the United States Gypsum Company felt that that should

be itemized in a little greater detail, and include with it an affidavit signed by a responsible officer of each licensee when it was submitted, and that they should be turned in once a month.

Q. Do you recall what the form of the affidavit was? A. Well, the affidavit was itemized as to the type of board, whether it was wallboard or plasterboard or lath, and the price was carried across, and the total taken, and the amount of royalties, which was on a percentage basis, figured, and the amount carried at the bottom as being the amount of royalty due from each licensee to the licensor.

Q. I don't believe you understood my question. I believe you are giving me the form of the return, but I don't believe— A. (Interposing) I thought that was what you asked for.

Q. No, my question was—was there any suggestion as to what the affidavit should contain, that is such as that the affiant had observed the bulletin prices, and that this was a correct return, and so forth—do you understand what I mean by that? A. Yes.

Q. Was there any discussion, or was there any
4030 suggestion from Mr. MacLeish, as to the form that that affidavit should take, if you remember? A. I don't remember.

Q. You don't remember that? A. No.

Mr. Knuff: If your Honor pleases, we offer in evidence Government's Exhibit 477, and I am not unmindful of your Honor's ruling of yesterday. I am offering it in good faith—

Justice Stephens: (Interposing) I am sure you are. Is there any objection to it?

Mr. Bromley: That is objected to as incompetent.

Justice Stephens: What is your theory of its admissibility?

Mr. Knuff: My theory of its admissibility in this case, your Honor is this.

It is certainly a written declaration. It is perhaps not a complete declaration, but nevertheless it is a declaration and on that basis it should be admitted.

On the other hand, I think it should be admitted to corroborate the oral testimony that Mr. Lenci has given today. He has here said what was discussed out there, or rather at that meeting. Now I think if the exhibit itself is in evidence, it will corroborate that testimony. Here is the memorandum that was made, here is the way it was

testified to today, and I think it corroborates rather
4031 fully Mr. Lenci's testimony.

In addition to that, I think that it is admissible on the theory of past recollection recorded.

Now I realize that there are statements in the text which say that a document that is offered on the theory of past recollection recorded is only admissible because the witness doesn't have any present recollection. But it seems to me that even if the witness does have a present recollection, that that fortifies what he said, and it should be doubly admissible on that basis.

This document was made by Mr. Lenci, it is in his own handwriting, it was made within a few days after the meeting was held, and we think that it is relevant, we think it has probative value, and we think that it should be admitted.

If your Honor recalls—Mr. Steffen has just called this to my attention—there were certain items on this exhibit where Mr. Lenci didn't recall just exactly what was said about them. And on that basis, or at least to that extent, I think it is unquestionably past recollection recorded.

Justice Stephens: He hasn't yet testified that it is a record of his past recollection.

Mr. Knuff: He has testified, as I understood this witness, that he made this memorandum within a few days after the meeting was held. I understood him to say that it was a correct resumé of the matters that were brought up
4032 at that meeting. Now I may be wrong on that.

Justice Stephens: I don't think he testified to that. It is possible that it is admissible, or that part of it might be admissible, as past recollection recorded if he would qualify it as such.

The Court doesn't mean to make an over-strict or extreme application of these rules. The Court does wish to keep the record down, and the Court also wishes to apply the rules, it is the Court's duty to apply the rules strictly in every case to the best of its ability.

It seems to me, although I will be glad to hear you further, and hear adverse counsel, that all this amounts to is an itemization of topics which were discussed, and that the witness has so fully stated all that was discussed, that there isn't any problem of confirmation or corroboration or refreshing or recording recollection any further.

4033 By Mr. Knuff:

Q. Mr. Lenci, is Government's Exhibit 477 for Identification a correct resumé of the matters that were discussed at the meeting in the Hotel Commodore on October 17, 1932? A. To the best of my knowledge it is a record of the various topics which were discussed.

Q. And is it a correct record? I am not asking you if it is a full record, but is it a correct record of the topics that were discussed? A. It is a record of the topics, without explaining what each one was.

Q. And this is in your own handwriting, is it not? A. Yes.

Q. And it was made within a few days after the meeting? A. Yes.

Justice Stephens: Do you wish to be heard, Mr. Bromley?

Mr. Bromley: I think that still doesn't qualify it under the theory of past recollection recorded. It doesn't help us to have a list of the topics, once counsel has gone over it and had him explain what happened at the meeting.

Justice Stephens: If I may illustrate the way it strikes me, for the purpose of aiding counsel, if this witness, when called to the witness stand, had said he did not remember what topics were discussed at that meeting, but that he did remember that after the meeting he had made a list
4034 of those topics, and that he had made that list correctly, and that he had made it at or about the time of the meeting—if it was material then to show what topics were discussed there you would have a clear case of past recollection recorded.

But the witness himself has testified, with the aid of this document to refresh his recollection, as to everything in it and a great deal more. So it ish't a record of his past recollection which he has no memory of now. It is a mere statement of topics which he does have a memory of now.

It seems to me that your contention would abolish the rule of past recollection recorded, Mr. Knuff, and present memory refreshed, because on your theory every such item or every such document should come in, whether you call by one name or another, to confirm what the witness has said, when what the witness has said doesn't need any confirmation.

I don't understand that there is any dispute about what he has said. Do you dispute the witness' statement, Mr. Bromley, as to what went on at this meeting?

Mr. Bromley: No, your Honor, I think what he said is substantially true.

Justice Stephens: You may, I assume, wish to qualify or modify his statement through cross examination, but there isn't any denial that such a meeting was held?

Mr. Bromley: No.

Justice Stephens: Or that Mr. MacLeish was there?

4035 Mr. Bromley: No, your Honor.

Justice Stephens: And that he discussed these topics?

Mr. Bromley: Oh no, there isn't any denial of that.

Justice Stephens: We do not mean to restrict the Government so narrowly that it can't put in items which really amount to declarations, or records of past memory, but it seems to us that this is a mere case of present recollection refreshed, and such documents are not admissible.

I will say frankly to you that it seems to us that you do not need it; the witness has testified to everything in it. How can your case be harmed if it isn't in evidence? It is already in evidence that he did make a record of these topics.

Mr. Knuff: I don't believe the middle portion of this is in evidence, your Honor, that is beginning with where the figures 1, 2, 3, 4, 5, 6, 7 and 8, and so forth, appear. I don't think he discussed those because he said he could remember his because of the "711", but that he couldn't remember anything about the rest.

Justice Stephens: If you take those Items 1, 2, 3, 4, 5, 6, 7 and 8, and the columns of figures and items and notations which follow them, and put them in alone, as a record of topics which were mentioned at this meeting by Mr. MacLeish, on the theory that he cannot remember those, and that they do constitute a list of topics, what do they mean? A document to be admissible must be intel-

4036 ligible.

Mr. Knuff: I didn't ask him what they meant because I know what they mean and I know that he can explain what they mean. I didn't ask him what they meant because—

Justice Stephens: (Interposing) If you want to develop by further inquiry—

Mr. Knuff: (continuing) —because I knew that he couldn't exactly remember 4,000,000 feet, or 6,700,000 feet, and so forth. I know exactly what they mean and I know that the witness knows what they mean—

Justice Stephens: (Interposing) Just a moment. If you can develop by further inquiry that those items are a designation of topics mentioned by Mr. MacLeish, which this witness cannot remember now but knows that he did truly record, that part of the document might possibly be admissible as past recollection recorded.

Justice Jackson: Maybe my recollection is faulty, but I thought the witness testified as to what those things meant, in the first column, after the 1, 2, 3, 4, 5, 6 and 7, that there were shown the number of violations, involving a certain amount of money and involving a certain number of square feet. Now he doesn't know to which of the licensees any of these applies, except as to his own. But as far as what they mean is concerned, I think he has told that. Maybe that is just my imagination, though.

Mr. Knuff: No, I don't think it is your imagina-
4037 tion, your Honor. I think there was an imperfect development of that because I knew that Mr. Lenci couldn't remember 3,500,000 or 2,800,000, and that is the reason I didn't go into it. I know that Mr. Lenci can explain what the figures 2, 5, 4, 6, 3, 1 and 7 on the left hand margin of the paper, mean in relation to the figures 1, 2, 3, 4, 5, 6, 7 and 8 which are inside the margin line. I know that he can explain that.

By Mr. Knuff:

Q. Mr. Lenci, the figure "1" under the word "Result" refers to what company? A. You asked me that before—

Justice Jackson: (Interposing) That has already been answered.

The Witness: Those figures on the left I can only answer by saying that I was speculating that they did apply to those companies.

Justice Jackson: Didn't you say that the names of the companies were not mentioned?

The Witness: Correct.

Justice Stephens: We will take the recess at this time until tomorrow morning at ten o'clock.

(Whereupon, at 4:05 o'clock, p.m., the hearing was recessed until Friday morning, February 18, 1944, at 10:00 o'clock.)

4038 IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA,

Plaintiff,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS,

Defendants.

Seventh Floor,
Internal Revenue Building,
Washington, D. C.,
Friday, February 18, 1944.

The above-entitled cause came on for further hearing at 10:00 o'clock a. m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

APPEARANCES:

(Same as heretofore noted.)

4040 Last night before we adjourned, we were discussing the admissibility of Exhibit 477, and during the evening I read the exhibit over very carefully, and compared it very carefully with the testimony of Mr. Lenci. It seems to the Court that it is not admissible in evidence except possibly in part.

It is used to refresh present recollection, and the recollection being refreshed, the exhibit is not needed in evidence and is not admissible in evidence.

To offer it as a whole, past recollection recorded, is to offer it on a factual theory completely conflicting
4041 with the theory that it refreshes present recollection.

There is one part of the exhibit which might possibly be admissible as past recollection recorded, and that is the four-column portion which commences in the middle of the exhibit. The first column has the figures 1 to 8, inclusive. The second column commences with the figure 361 and ends with the figure 172. The third column commences with the figure 45,000 and ends with the figure 35,000. The fourth column commences with the figure 4,000,000 and ends with the figure 2,800,000.

Now the witness testified that he could not himself independently remember those figures, but that he did record them as figures mentioned by Mr. MacLeish at this meeting to which the exhibit relates, of October 17. He testified that he could not allocate those figures to any particular licensee except the figure in the fourth line, 711, which he attributed to the Ebsary Gypsum Company.

Now if it is material and relevant in this case, under any of the issues, to show that Mr. MacLeish, for the United States Gypsum Company, charged that the defendants as a group had been guilty of the numbers of violations involving the numbers of dollars and the numbers of square feet described in those columns, I suppose those items would constitute a past recollection recorded, as those figures were testified to as having been stated by Mr. MacLeish.
4042 I will hear the Government very briefly on its contention that they are relevant to any issue in this case. How can they be relevant? What do they prove? The charge here is not violation of the license agreements, but violation of the Sherman Act.

Mr. Knuff: I think they are relevant, but I don't think it is a matter of great importance, and we are not going to urge it.

Justice Stephens: The Court wants to be liberal and fair in respect of the introduction of the case of both the Government and the defendants. We want to err on the side—if there is any error—of giving both parties a full opportunity to present their case.

What do you claim the relevancy of the figures is?

Mr. Knuff: It would show, if Your Honor please, that the bulletins themselves were not clear, and that there was regulation here; and that the regulations, the bulletins that were doing the regulating, were anything but clear, because

here you have the amount of violations that are set forth in this exhibit, and I think it was Mr. MacLeish's contention that possibly the regulations weren't clear and that is the reason they did have so many violations; and to overcome that they felt that there should be more frequent meetings of the licensees so that that wouldn't happen in the future.

4043 Justice Stephens: And if it is proved that there had to be frequent meetings of the licensees, and that the bulletins were not clear, and that that occasioned the numbers of charged breaches of the licenses, what does that prove? It may prove something, but I don't understand it yet. What does it prove as far as the Government's case is concerned?

Mr. Knuff: Well, as I say, Your Honor, in so far as the Government's case is concerned, that, in and of itself, doesn't prove anything, those figures don't prove a thing.

Justice Jackson: You don't attach any importance to it?

Mr. Knuff: Not at all, Your Honor.

Mr. Bromley: May I be heard, Your Honor?

Justice Stephens: Certainly, Mr. Bromley.

Mr. Bromley: It seems to me that this question which Your Honor has raised, raises a fundamental question. Over the recess I have been trying to find out, if I could, just what it is the Government thinks it has a right to prove in this case by either the provisions of the price bulletins, or these meetings, or these complaints that were made to the Board Survey Company, and I can not find any ground on which they are material or relevant, particularly in view of the fact that in the criminal case, in Mr. Kelleher's

4044 opening, at page 188, he said:

"At the outset, you should understand that we make no contention in this case that there was anything illegal in the way these companies sold and determined the price at which they would sell the board which they manufactured, to dealers."

And he reiterated that concession again and again. For instance, at page 197, he said:

"As I said before, no contention is made that USG or its licensees violated the law in selling at prices fixed by USG, to dealers."

There are 10 pages of his opening, between pages 188 and 198, in which it seems to me that he concedes, without any reservation, the entire legality of every provision in the price bulletins, the entire legality of what Mr. Knuff has referred to as policing.

That matter came up time and time again while this very witness was on the stand and these very exhibits were being offered, things like this would happen—

Justice Jackson: (Interposing) Were they received in evidence, these exhibits, in the criminal trial?

Mr. Bromley: Only a very few of those that are now being offered, and those that were received had to do not with policing the licenses, but with a charge of the fixing of the resale prices of manufacturing distributors.

4045 Justice Jackson: Were they offered in evidence, the others?

Mr. Bromley: They are all mixed up, some of them were and some weren't.

Justice Jackson: That is just a matter of curiosity.

Mr. Steffen: I can answer your question specifically. They were offered, and Mr. Bromley insisted that they be admitted.

Mr. Bromley: Yes, in so far as they had to do with resale price fixing.

What I started to say was that Mr. Kelleher would frequently make statements like this, at page 671 of the testimony:

"Of course, we don't charge that the elimination of commission men among the licensees was illegal."

Then at the bottom of page 672, I said to him:

"So that you will concede, Mr. Kelleher, that this bulletin in provision"—meaning commission men—"was not made as a result of any unlawful understanding or agreement between the licensor and the licensees?

"Mr. Kelleher: I have made that concession so often, Mr. Bromley, that I don't see any necessity for it again."

Justice Stephens: Read that again, will you, please?

Mr. Bromley: (Reading):

"Mr. Bromley: So that you will concede, Mr. Kelle-

4046 her, that this bulletin provision"—commission men—

"was not made as a result of any unlawful understanding or agreement between the licensor and the licensees?

"Mr. Kelleher: I have made that concession so often, Mr. Bromley, that I don't see any necessity for it again."

Justice Stephens: That has to do with the provisions of the license which forbade the payment of commissions?

Mr. Bromley: Yes.

Justice Stephens: That is, rebate in the form of commissions?

Mr. Bromley: Rebating through commissions.

I only used this reference on page 672 as illustrative of the fact that the 10 pages to which I referred, beginning at page 188 in his opening, can be, it seems to me, readily demonstrated as being a binding concession that all these price bulletins, all these licensees' meetings, all of the complaints—and mind you, there were many, many complaints involving the prices at which licensees sold to dealers, where USG would find a dealer selling at a low price or some other licensee would find a dealer selling at a low price, and they would think that was evidence that the supplying licensee must have been cutting his price to the dealer, and there were many, many of those transactions—were not illegal.

And we find the exhibits about to come up now. In
4047 other words, we find here, it seems to me, an attempt to attack every provision in the price bulletins and every attempt of the licensor to try to secure adherence to those provisions, on the ground that all of those provisions and all of those attempts were illegal; whereas, in the criminal case, Mr. Kelleher conceded without reservation that they were all lawful and legal and not the result of any conspiracy, and that the only illegal thing about them was that when these defendants attempted to control the resale price of the manufacturing distributors, then that overstepped the limits of lawful price control and that activity became unlawful.

So it seems to me that we are again faced with the same situation as we were in the Calvin Tomkins matter, where the Government has made a specific concession, without any reservation of any kind, that this whole price fixing scheme and its enforcement was entirely lawful and legal, except so much of it as attempted to extend price fixing beyond its lawful limits. And we admit this, that we can not control resale prices.

So I say that the Government has conceded that up to the point where they say we attempted to extend price control too far, and attempted to bring into that control resale prices, the Government concedes that all of our activities were lawful.

4048 So I think this question raises a fundamental proposition as to whether any of this evidence is material.

I thought my friend, when he introduced the subject of this first meeting, was probably going to try to prove that at this first meeting something was said or done which would be material to the charge that the license agreements were

a mere subterfuge; or that something was said or done at this first meeting about trying to control the resale prices of manufacturing distributors. And, of course, he would have a right to do that, to go into every one of these meetings and prove, if he could, that something was said or done which supported the charge of subterfuge, or supported the charge of resale price fixing.

But now we are through with this first meeting, and there is no suggestion of anything of that kind. Rather do we find it proffered on the basis that it is material to attack price fixing by the licensor of the licensees' prices, a position which the Government not only abandoned before but conceded was perfectly lawful under the *General Electric* case.

So I say that on that ground, this evidence is entirely immaterial.

Justice Stephens: I was puzzled, I will say to the gentlemen for the Government as well as the defendants, as to why the Government was proving all of this detailed
4049 matter.

It occurred to me, Mr. Bromley, that perhaps the Government's theory was along the line of showing that the pattern of the license agreements, the complication thereof, the manner of carrying them into effect, with respect to area limitations and limitations on the amount of board which must be sold, and the like, carried the price fixing plan beyond the limits of the *General Electric Company* doctrine.

But that, I would think, could be shown by the bulletins.

Mr. Bromley: That is just what Kelleher conceded it did not do, that is my point. He conceded that this plan, as we worked it out, was protected by the *General Electric* case, and that there was nothing unlawful about it, nothing unlawful about such a provision as commission men, or any of the other provisions—

Justice Stephens: (Interposing) Provided it was in good faith and not a subterfuge.

Mr. Bromley: Provided it was not a subterfuge. That is the very point I am trying to make. And in these 10 pages to which I referred, Mr. Kelleher lists these provisions about trucking areas, and minimum quantities, and pick-ups, and commission men, so there can't be any doubt as to what he was talking about and as to what he conceded.

And I call those pages to Your Honors' attention in
4050 the hope that you will read them—they are too long for me to read now—but I make the point that he

takes up these very things, jobbers, and those items, that the Government now seems to be attacking as illegal. So that there is no confusion as to the extent of Mr. Kelleher's concession of legality. And he takes up these very meetings.

So that it seems to me that under the principle established in this trial with regard to the Calvin Tomkins concession, and its binding effect, that the Government is foreclosed to level an attack now on the provisions of the price bulletins as being illegal, or on the activities of the Board Survey Company in securing adherence to the contractual obligations of the licensees.

Justice Stephens: Let us hear from the Government.

Mr. Steffen: I am rather surprised at the argument that Mr. Bromley is making. Obviously, we don't have here the references to the pages in Mr. Kelleher's opening, and are not prepared to give the Court chapter and verse on what we have to say, at the moment.

Justice Stephens: If you would prefer, the Court will take a recess and let you read that, and the Court can read it.

Mr. Steffen: I would prefer to give you at the moment a brief statement, with a reservation of the right to cite chapter and verse later.

4051 Justice Stephens: Very well.

Mr. Steffen: Mr. Bromley has made this point, which he tried to make when we first started this discussion back on the question of interrogatories, the first day in this court room; and at that time I challenged Mr. Bromley, and he took to water, as I think he will have to now.

Mr. Bromley, in the course of the criminal trial, kept insisting that Mr. Kelleher conceded, as he has been doing here all the time, various things. And he wanted Mr. Kelleher to concede that the patent license agreements were legal, and that all the regulations under the patent licensing agreements were legal.

I brought out at the time we first brought this thing up, a year and some months ago, that Mr. Kelleher did not make that concession, and we do not make that concession; and the sections or the paragraphs which Mr. Bromley has cited to you must be read in the context in which they took place in order that you can get any notion of what the issues were and what the concessions or arguments were before the criminal court.

Let's get down to facts.

I have the indictment here in the criminal action, and

I think I ought to read it in order to make it perfectly clear, for purposes of this discussion.

On page 8 of the indictment the charge is made, in
4052 Paragraph 13:

"Beginning in the year 1929, the exact date being to the Grand Jurors unknown, and continuing to the date of the presentation of this indictment, the defendants and the corporations hereinbefore named as co-conspirators, and others to the Grand Jurors unknown, have been continuously engaged in a wrongful and unlawful combination and conspiracy in restraint of the aforesaid trade and commerce in gypsum board between the States and the District of Columbia in violation of Section 3 of the Act."

Paragraph 14 says:

"Throughout the period of time aforesaid the manufacturers, including each of the defendant corporations and the distributors, acting in part through the individuals named as defendants herein, were engaged within the District of Columbia in an unlawful combination and conspiracy"—this is the essential part—"to establish, fix and make uniform and non-competitive the distributors' resale prices to dealers and consumers for gypsum board purchased from the manufacturers by the distributors and resold by the distributors in commerce between the States and the District of Columbia as aforesaid."

That was the issue, that was the charge that was before the Court in the criminal case, that is, that the Government
charged the defendant USG and the licensees with
4053 having fixed and controlled the resale prices of distributors to dealers. And that was all that was involved, that was the issue.

And Mr. Kelleher—I don't have the section at hand—but Mr. Kelleher very carefully, in his opening statement, and I cited it to Your Honors a year or more ago, said that as respects the other violations—and those are the violations which we are now raising this morning, in this case—as respects the other violations we make no point one way or the other, we make no concessions. And he made no concessions, and I don't make any concession that Mr. Kelleher made any concessions, that those matters were legal. They weren't in issue, that is all that was involved, they weren't in issue in the criminal case. The only things that were in issue in the criminal case—

and it was a very narrow question—are what we have charged here in Paragraph 45(e), I think:

"concertedly inducing and coercing manufacturing distributors to resell, at the prices raised and fixed by said companies as aforesaid. * * *"

That is the charge which was tried in the criminal case, and that was all that was charged in the criminal indictment, and there was no relevance to most of the matters which we have brought up here.

These exhibits, the one that Your Honors ruled upon just a moment ago, the memoranda of meetings at which Mr. Lenci was present, were introduced only as respects one or two items, those having to do with resale price maintenance by distributors. All the rest of the matter was certainly not conceded as being legal, nor was it conceded or stated to be illegal. The matter was not in issue and wouldn't have been relevant before that Court, and we most positively are going to stand on that.

Now if I can take up the constructive argument as to why we do think this evidence is relevant, granting that we made no concessions to exclude it,—and I certainly want to be heard at length before any ruling to the contrary is made on that point,—we consider that this evidence concerning all of the meetings that took place after 1929, between licensees and licensor, is perhaps almost conclusive evidence to show what the purpose of the defendants was when they went into the agreement in 1929, that is, it is very strong evidence from which the Court can infer that their purpose was not simply to take out a license and to be permitted to make a closed-edge board; their purpose was to control and to stabilize the entire industry in all respects.

And as you have seen this evidence as it is coming on, they have gone into great detail as to how you are going to handle switching charges, and advertising; as to whether you can or can not have a commission man; as to whether you can sell through jobbers; as to what the price should be for switching charges in Grand Rapids, Michigan—and I could go on in great detail—as we said yesterday, as to whether or not you can give away carpenter's aprons in order to promote the sale of board, and as to what sizes of board you may have, or what the standardization of the board should be.

That is, in the first instance, an indication of what their real purpose was when they entered into the 1929 agreements, that is, to end the price war and stabilize the industry. And all that sweep of evidence is certainly admissible for that purpose.

4056 It is next admissible for purposes of showing that they have gone completely beyond the protection afforded them by the General Electric case.

The General Electric case said that it is permissible, where you have a patent completely covering a product, and a valid patent, to fix the price at which a licensee may sell the article which he manufactures.

The agreements here, made in 1929, in Paragraph 2 specify that this license—and you may notice that that Paragraph 2 comes just immediately after they open their contract, and that is the thing they had in mind—that this license is given upon the condition that the licensor may fix the minimum price or prices at which the licensee may sell the patented board, or so-called patented board.

Now on that one little provision—and there are none other such in that long agreement—they have to build this entire system of trade regulation. They couldn't go any farther because the General Electric case said that they had only a right to fix prices. Under that right to fix prices they tell you whether you can warehouse your goods in a dealer's warehouse; they tell you whether you can ship less than 7500 square feet in a truck; whether you can go beyond this county and into the next county—they tell you everything you can do about your business under the "right to fix prices" as they say.

4057 Now if they have gone too far they have no defense in this case, and that is all charged in great detail in this complaint, and I think I should bring it out in order that we will have this perfectly clear.

We charge, in Paragraph 45, that:

"Said companies have entered into, have carried out, and are carrying out said combination for the purpose and with the effect, of restraining, dominating, and controlling the manufacture and distribution of said gypsum products in the Eastern area."

This evidence is certainly evidence concerning the control of distribution of products in the Eastern area, so-called.

Now that is carried on—and if you will refer to Paragraphs 89, 90, 91 and 92 of the Complaint you will see

the whole set-up of policing and control which has been established—all within this one little paragraph giving them the right to fix prices. Within that they set up the Board Survey Company. They look down each other's collars with great care to determine whether they may have cut the price ten cents at some point or other. If they have, then there is an investigation—and they carry that out to the point of investigating what the manufacturing distributors have done. As I say, that is all charged in the complaint in very great detail.

4058 Paragraph 91 says:

"From time to time throughout said period, U.S.G. has circulated among its licensees numerous bulletins setting forth the aforesaid prices and terms and conditions of sale for gypsum board. The licensees, throughout said period, have adhered to said prices and terms and conditions of sale. The prices and terms and conditions of sale contained in said bulletins will sometimes be referred to hereinafter as the bulletin prices. Said bulletins, copies of forms of which are set forth as Exhibit No. 7 in the appendix hereto, have contained the following limitations and regulations upon sales of gypsum board by the licensees".

That follows the general provision in paragraph 90 that:

"Throughout the period from the year 1929 to the date of filing this complaint, U.S.G. has determined and fixed the selling prices and terms and conditions of sale of its licensees. Throughout said period the licensees of U.S.G. have sold all gypsum board manufactured by them at the prices and on the terms and conditions of sale determined and fixed by U.S.G. as aforesaid."

Then we list the whole series of terms and conditions from (a) to (u), covering everything.

You have to have an arbitrary billing rate. Even though your board doesn't weigh the exact amount, you still have to bill at an arbitrary weight.

4059 Then in subparagraph (e) it says:

"(e) minimum quantities of gypsum board for: (1) Carload sales; (2) delivered truck sales; (3) pickups at mills or warehouses; (4) mixed carload and truckload sales; and (5) pool car sales".

Then we get over to paragraph 121, which states in general terms the effect of the combination:

"By means of the combination, the defendants have controlled and dominated, for more than ten years, the manufacture and distribution of 100% of the gypsum board and 80% of the plaster and miscellaneous gypsum products manufactured and sold in the Eastern area", and so forth.

So that the charge of an unreasonable regulation of the distribution of products, that is regulation which constitutes a restraint of trade, is completely made in the complaint, and this evidence all comes in, first, to show that their real purpose was to control, that it was subterfuge; second, to show that whether it was subterfuge or not, they have gone completely outside of any provisions or protection which might be afforded them under the General Electric case, and that it is a straight case of regulating an industry from beginning to end.

Therefore, it is necessary for us to show in detail just what they have been doing in order to show how unreasonable this is. Many of these things that we are offer-
4060 ing you are picayune, but being picayune is, itself, evidence of the detail and care with which they have gone into the matter of regulation, and that is charged in the complaint as being a restraint, and we propose to prove just that, and I think there is no question but what we can.

I must say, in closing, that Mr. Kelleher did not concede, and I do not concede, that he at any point ever said that these matters were legal or were not to be brought up at a proper time. Mr. Kelleher said that so far as the case before the District Court was concerned—we didn't look at the patent licenses—he was not looking at the patent licenses, he didn't test those at all.

So far as the regulation of all these matters was concerned, so far as price fixing by licensees was concerned, which is the gist of this case, I mean general fixing of prices under the license agreements, that was not at issue; it was a little narrow issue of whether these licensees had controlled the resale price of manufacturing distributors and therefore, everything else, practically all of the matter that we have in this case, was over to one side.

I don't know that there is any issue up. I would suggest that we proceed with the evidence.

Justice Stephens: Well, that is true. Nevertheless, this is a clarifying discussion, and it is helpful to have at the present time because the Court was going to make
4061 a suggestion to counsel for the Government, if there

is to be a great deal more of this type of evidence, as to how it perhaps can be put in with much less consumption of time. Since it is obvious that objection will be made to the introduction of this evidence on the ground that it is irrelevant under the charges in the complaint, we might as well hear from Mr. Bromley, in reply, and look at these statements of Mr. Kelleher, and then we will be in a position to rule on such an objection if it is made.

What do you say, Mr. Bromley, in response to Mr. Steffen's argument?

Mr. Bromley: May it please the Court, it seems to me that it is not a question of what the charges in the complaint are, but it is a question of whether or not the Government has waived them in the criminal case in such fashion that it ought not to be permitted to contend that those charges are illegal.

I don't know what my friend means when he says that Mr. Kelleher did not waive them; I cannot understand any clearer language, picking out one of these little points, than the first language that I read on page 672.

There I was examining this very witness, Mr. Lenci, and trying to go into the purpose and effect of the bulletin provision about commission men, and Mr. Kelleher objected, and the court wanted to know why he objected.

Then I said, after Mr. Kelleher had made some 4062 statements to the judge:

"So that you will concede, Mr. Kelleher, that this bulletin provision was not made as the result of any unlawful understanding or agreement between the licensor and the licensees?"

Justice Jackson: Was that really a matter in issue in the criminal case? As I understood Mr. Steffen, the indictment in the criminal case was narrow, and it centered just on one subparagraph in the present complaint.

Mr. Bromley: Well, of course that argument by Mr. Steffen is just the reverse of what he is making here. He says that under paragraph 44 or paragraph 45 he is entitled to prove anything. Now the indictment had a paragraph as broad as his paragraphs 44 or 45, and that was paragraph 13 of the indictment, reading:

"Beginning in the year 1929, the exact date being to the grand jurors unknown, and continuing to the date of the

presentation of this indictment, the defendants and the corporations hereinbefore named as co-conspirators herein, and others to the grand jurors unknown, have been continuously engaged in a wrongful and unlawful combination and conspiracy in restraint of the aforesaid trade and commerce in gypsum board between the States and the District of Columbia", in violation of the Sherman Act.

So there was the broad charge there. True, it
4063 was followed by other paragraphs which narrowed it, perhaps, but that is not the important thing. The important thing is that I was trying to get him there to take a position as to whether the indictment was broad or narrow, and that this question was up there just as it was here, as to whether this charge was a broad one or a narrow one.

And in connection with that argument, and in order to support his position, he made concessions with respect to this broad conspiracy alleged in paragraph 13, that I needn't bother about litigating that because he conceded that all of it was lawful; and that took it out of the case although charged in broad language, he took it out of the case by conceding that it was lawful.

I don't think it makes any difference whether that determination was res adjudicata or was litigated or not, or could have been litigated or not, so far as the point which I am now arguing is concerned, because all I am now arguing is that in connection with the dispute between us at the criminal trial as to whether this indictment was broad or narrow, he convinced the court that it didn't make any difference, even if it were broad, because the Government conceded the legality of everything that we did up to the point of trying, as he said, to fix resale prices.

So I don't think it makes any difference whether those issues were litigated there or not. In connection
4064 with that question, a concession was made just exactly in the same fashion that the concession was made with respect to Calvin Tomkins.

Now it didn't make any difference whether the indictment charged that this Calvin Tomkins device was lawful or unlawful. The fact is that, the point having been raised there, Mr. Kelleher conceded that the pricing by Calvin Tomkins was lawful, and this Court has ruled that that should be binding on the Government.

Now this situation is precisely the same, and all I argue is that there was a binding concession made as to the legal-

ity of everything we did up to the point of the charge that we attempted to fix resale prices, and the Government ought now to abide by it and not try to go back on it.

That is why I wanted the Court to read the ten pages in Mr. Kelleher's opening because that serves as the foundation from which these other concessions flowed later on.

Mr. Steffen: I want to say as to the Calvin Tomkins matter, that we did, quite cheerfully, concede that we would be bound by anything that Mr. Kelleher said concerning the Calvin Tomkins matter.

But note carefully that the Calvin Tomkins matter was as to manufacturing distributors. It had to do with the very issue that was before the court in that case—and I, quite decently, I thought—said that we would be
4065 bound by anything that Mr. Kelleher had agreed to in that case.

I didn't think that he had actually agreed as far as your Honors went, but we have made no point of that. But note carefully that it is a very different situation.

Whateyer Mr. Kelleher conceded as to whether the Calvin Tomkins Company was to be identified with the Newark Company and that there was no illegality in the fact, as testified to here, that Newark actually sold the Calvin Tomkins Company and the Calvin Tomkins Company actually sold at bulletin prices, Mr. Kelleher took that out of the case. So, as far as that transaction is concerned, we haven't anything to do with it.

But that concession only had to do with the very issue that was before the Court.

As far as our paragraph 45 (e) is concerned, that concession will hold, but there is no binding concession, or any concession, by Mr. Kelleher that the whole civil case is out of consideration, because he stated explicitly, and we will cite you the point, that the civil case was to come on later and at that time the whole question of the legality of the patent license agreements and of everything that was done under those agreements, would be tested out, and that is what we are doing here in so far as we have charged it in the complaint.

As I pointed out, the whole matter of distribution has been charged in the complaint as being a restraint
4066 of trade, and completely beyond the scope of the protection, if any, afforded by the General Electric case.

Justice Stephens: Did your complaint charge both? Is it the theory of your complaint to charge, first, that the

agreements are illegal because they go beyond the proper limits of the General Electric case; and, second, that they are mere subterfuge?

Mr. Steffen: Yes. Let me make that clear, your Honor.

In our paragraph 44 we charge broadly restraints of trade. Then we have provided in the remainder of the complaint a series of different illustrations of restraints. One of them is price fixing; another one is standardizing products; another one is eliminating jobbers; and another one is control of distribution—such as we have here.

Then in paragraph 46 we say that all of this was done by subterfuge.

Now in so far as we put in evidence to show subterfuge, what we are doing is to negative the defendants' answer, and their defense. Their defense is that everything they did was legal because they had a patent license agreement, and that everything could be done under the patent license agreement.

We just say that in so far as we can show that it was subterfuge, that defense is out of the case.

Justice Stephens: You say that even if it were
4067 legal, still it wasn't bona fide?

Mr. Steffen: We would say that, yes.

Mr. Bromley: In answering your Honor's question, there certainly is no charge in their equity complaint that these provisions of the bulletins were unreasonable. All you have to do is look at paragraphs 90, 91, and 92 of the complaint. They are just recited as background and there is no charge that they are unreasonable or unlawful, by any stretch of the imagination.

Mr. Steffen: We don't have to use the word "unreasonable", your Honor, if we recite what they were doing, and if what they were doing is clearly beyond what anybody is permitted to do, which was the case here. The Court itself determines whether or not it was unreasonable, as a conclusion of law.

Justice Stephens: Well, the Court will first make one or two other corrections of the record, my transcripts now having been brought to me.

I have no corrections to suggest in the morning.

In the afternoon session, at page 4280, Mr. Knuff, in your question commencing at line 7, you say:

"Q. The Board Survey Company had filed a notice or had written you a letter to the effect that the Connecticut Adamant Plaster Company was offering patented board,

manufactured and sold by you, to the New Haven
4068 Reserve Supply Company and other New Haven dealers in quantities", and so forth.

I think that should be singular, "in quantity". That is the phrase used in the previous questioning or the answers by the witness on that subject, as I remember it, and I think there is an exhibit also which refers to "in quantity". I don't know whether it is especially material, but I call it to your attention, it is your own phrase. You can make it show what you think it should, of course, but I thought you said "in quantity".

Mr. Knuff: I think that that is the way the question should have been phrased, "in quantity".

Justice Stephens: That may be changed then to "in quantity".

Page 4295, line 14, I think the word "that" should be stricken out after the word "attend".

Mr. Knuff: That is correct.

Justice Stephens: Page 4315. Mr. Knuff, your question, commencing at line 24, says:

"Q. I saw two letters this morning".

Did you mean that? I didn't quite understand what you meant by that. Perhaps it is correct, I don't know.

Mr. Knuff: I probably should have said that "I referred to two letters this morning", which is correct. I referred
to the letter of August 16th and the witness had
4069 before him the reply of the 18th acknowledging the letter of the 16th.

Justice Stephens: Then that is all right. I thought probably you meant to say "*you* saw two letters this morning", but if you said "I", we will leave it as it is.

Mr. Knuff: I didn't see the two letters, I only saw one. The letter of August 18th said that it was in reply to a letter of August 16th. It should be, "I referred to two letters this morning".

Justice Stephens: Then that change may be made.

Mr. Bromley, will you mark in that record the pages of Mr. Kelleher's alleged concession, and also the ten pages that you referred to, and we will take the morning recess and look at it. Perhaps you had better make a list of those references for our information.

Mr. Bromley: Yes, your Honor.

Justice Garrett: Mr. Bromley, I think you had there also a printed copy of the indictment from which you read, did you not?

Mr. Bromley: Yes, your Honor.

Justice Garrett: I wonder if we may borrow that also?
Mr. Bromley: Yes, your Honor.
Justice Stephens: You may announce a recess for fifteen minutes.

(Whereupon, at 11:00 o'clock a.m., a fifteen-minute recess was taken, which was later extended to 1:45 o'clock p. m.)

4070 AFTERNOON SESSION

(The trial was resumed at 1:45 o'clock, p. m., pursuant to recess.)

Justice Stephens: Strictly speaking, there is nothing before the Court upon which to rule. The last exhibit which was offered was finally excluded.

The Court has read with care the statements of Mr. Kelleher in the criminal trial, and has also read the complaint. The two questions which seem to be raised, informally—first, as to what the complaint charges; and, second, as to what was conceded in the criminal case—will be passed upon, if necessary, when some objection is made which actually raises them, so that the ruling will not be in the nature of an advisory opinion.

You may proceed, then, with the Government's case until some objection arises which presents these two questions, or either of them.

The Court has a suggestion to make to Government counsel in respect of the manner of presentation of the case and this class of testimony. It is merely a suggestion, and it may be it is not feasible to carry it out because, in the first place, we all have to try cases our own individual way, in the large, and every man has somewhat different methods of workmanship; and, second, it may be that the nature of the exhibits and the difficulties
4071 under which you are working won't make this possible.

But it has occurred to us, gentlemen for the Government, that much time could be saved in the court room with reference to three classes of exhibits, or rather, with respect to exhibits which affect three classes of testimony:

A very large number of bulletins have been put in evidence, sent to Ebsary; a substantial number of notices of meetings have been put in evidence, sent to Ebsary; and a great deal of evidence of complaints of infractions of the license agreements have been put in evidence—all of these being in the form of documentary exhibits.

Now, of course, where exhibits are, so to speak, unique and present some individual problem which the Court must rule on or understand with respect to each exhibit, it is highly desirable, then, that each exhibit shall be presented separately so that the Court can rule on it and have it in or out of the record and a ruling clearly made on it at the time.

But it has occurred to us that, for example, if you have 25 bulletins to introduce in evidence, you might have them marked all at one time, serially, by the Court Reporter, and present them to the witness—or to the defendants, if the defendants are willing to admit that they were sent—have the witness identify all of them, after looking at them, by an answer to one question which
4072 mentions them inclusively, then offer them all at once, except that you might, of course, wish to particularize by asking the witness a particular question about one exhibit as to whether it dealt with the alleged elimination of jobbers; another, whether it dealt with the area in which trucking could be done; another, whether it dealt with the basing points; and another, whether it dealt with commissions.

But where exhibits all follow a pattern, where notices all follow a pattern or notices of infractions all follow a pattern, it occurs to us that if you could introduce them in groups that way, it would save the time of the Court Reporter having to mark them all separately, the lawyers examining on them separately, and examining each signature separately, and perhaps we could accomplish in an hour what might otherwise take two or three hours.

That, I repeat, is just a suggestion that may not be feasible. I assume it will not be feasible at the moment, because you would have to rearrange your exhibits, and you are not expected to follow it now, even if it is a good suggestion.

Mr. Knuff: I think it is a good suggestion, Your Honor.

Justice Stephens: Now you may proceed.

Mr. Knuff: Mr. Lenci, will you take the stand, please?

4073 Thereupon, GEORGE N. LENCI, recalled as a witness, resumed the stand and testified further as follows:

Direct Examination (resumed)

Justice Stephens: Which is the next set of exhibits?

Mr. Knuff: The memorandum beginning November 15, 1932, a long memorandum.

Justice Jackson: In longhand?

Mr. Knuff: Yes, Your Honor.

Justice Stephens: Right next to the one we have just been discussing?

Mr. Knuff: That is correct, Your Honor.

Justice Jackson: Next to Exhibit 477.

Mr. Knuff: Yes.

My understanding is that Government's Exhibit 477 was objected to and the objection was sustained; is that correct?

Justice Stephens: Yes. You finally stated, at the close of the discussion this morning, that you didn't regard those four or five items in the middle of the page as of any importance, and therefore that exhibit was excluded. The Court thinks you have really presented in evidence everything by the oral testimony of the witness that is material to your contentions under this aspect of the case. Even if the fact that he wrote the exhibit tends to confirm
4074 his statements that the meetings were held, the record already shows that he wrote the exhibit because he testified that he did.

Mr. Knuff: I was just trying to conform my action here to what Mr. Bromley suggested in the criminal case. Mr. Bromley there suggested that they be offered, in the criminal case, and I was just following that.

Justice Stephens: You are entitled to offer anything you want to and get a ruling on it and make your record.

By Mr. Knuff:

Q. Mr. Lenci, did you attend a meeting—you understand, of course, that you are still under oath? A. That is right.

Q. Did you attend a meeting, Mr. Lenci, of licensees on the 15th of November, 1932, at the Hotel Commodore in New York City? A. I don't remember.

Q. I show you what has been marked for Identification as Government's Exhibit No. 478.

(The document referred to was marked as Government's Exhibit No. 478 for Identification.)

By Mr. Knuff:

Q. I will ask you to take a look at that and see if that refreshes your recollection? A. Yes.

4075 Q. Your answer to my previous question, then, is that you did attend a meeting at the Commodore

Hotel on November 15, 1932, and I take it by that you mean the Commodore Hotel in New York City; is that correct? A. Yes.

Q. Who was present at this meeting?

Justice Stephens: Have you had time to look that over?

The Witness: I have just glanced at it.

Justice Stephens: Suppose you read it over carefully and see if it refreshes your recollection, and perhaps you can then tell us.

Justice Jackson: It is all in your handwriting?

The Witness: Yes.

(Exhibit examined by the witness and the Court.)

Justice Stephens: Proceed.

Br. Mr. Knuff:

Q. Mr. Lenci, Government's Exhibit 478 for Identification is a memorandum that is made in your handwriting, is that correct? A. Yes.

Q. Did you make it at the time of the meeting? A. I made it at the time of the meeting or very shortly thereafter.

Q. And does it purport to list the various subject matters that were discussed at that meeting? A. Yes.

4076 Q. And the list that you have made there, is that a correct list of what was discussed at the meeting? A. I think so.

Q. When you say you made it a short time after the meeting, do you mean a matter of days or a matter of weeks or a matter of hours? A. It was probably within the next day or so.

Q. The next day or so? A. Yes.

Q. Who was present at that meeting? A. The United States Gypsum Company was represented by Mr. Henning and Mr. MacLeish.

The Atlantic Gypsum by Mr. Neale and Mr. Fuller.

The Kelley Plasterboard Company by Mr. Kelley.

The Ebsary Gypsum Company by Mr. Ebsary and myself.

The National by Mr. Baker.

The Certain-teed by Mr. C. O. Brown and Mr. Roos.

Q. What Roos was that, Edwin G. Roos or Carlisle K. Roos? There are two Rooses, Carlisle K., who was employed by the United States Gypsum Company, and— A. (Interposing) This was Ed Roos of the Certain-teed.

Q. I see. A. American was represented by Mr.
4077 Black, and the Universal by Mr. Holland.

Q. Texas was not at that meeting? A. Texas was not there.

Q. Who acted as chairman of the meeting, if any person? A. There was no formal set-up to the thing at all.

Q. How long did the meeting last? A. I don't remember now, but it was not over the one day.

Q. Were notes of the meeting formally taken, that is, by a stenographer or secretary? A. No, it was entirely informal.

Q. An informal meeting? A. Yes, sir.

Q. And you say no person acted as chairman? A. There was no formal set-up at all. The meeting was called by the United States Gypsum Company, and that was all there was to it.

Q. Now at that meeting, were any complaints discussed? A. I believe there were.

Q. What complaints were discussed?

Mr. Bromley: I object to that on the ground that it is immaterial and irrelevant to any issue in this case.

Justice Stephens: Are you raising the question which was informally argued this morning?

4078 Mr. Bromley: Yes, sir, I think I am.

Justice Jackson: In other words, it is immaterial and not relevant because of the concession that you argued about?

Mr. Bromley: Yes, sir.

Justice Stephens: And also, I assume, because you contend the complaint does not charge that these agreements were illegal?

Mr. Bromley: Yes, Your Honor.

Justice Stephens: And the practices under them?

Mr. Bromley: Yes, Your Honor.

Justice Stephens: Well, that presents the questions which were informally argued this morning.

We have reached the conclusion, gentlemen, so far as the concession is concerned, that the contentions of the Government in respect of that are correct.

We think Mr. Kelleher's concessions were limited to the case which was on trial. Pages 188 to 198 of Volume 1 of the transcript of the criminal proceedings handed to the Court by Mr. Bromley, and also pages 671 to 673 of Volume 2, have been carefully read by the Judges, and it is true therein, as you point out, Mr. Bromley, that Mr. Kelleher gave a very careful discussion or statement or

description of the provisions of the license agreements, and of the practices thereunder, which are the sub-
4079 ject of description in the present complaint. But we think in three instances it was made clear by Mr. Kelleher, two or three instances, and once by the Court, that Mr. Kelleher's concession was limited to that case.

At page 188 of Volume 1, he said:

"At the outset, you should understand that we make no contention in this case that there was anything illegal in the way these companies sold and determined the price at which they would sell the board which they manufactured, to dealers. Instead, as I have already explained, the indictment charges the defendants with inducing distributors who bought gypsum board from them, to resell that board at the same prices and on the same terms and conditions upon which the defendant companies themselves sold it. Therefore, you will see that in order for you to understand how they fixed these distributors' prices, it is necessary for you to know how they determined their own prices."

Then he refers to the contracts, the license agreements of 1929 and 1930, and very fully describes the practices under the license agreements, as well as the terms and conditions thereof.

At page 197 he said:

"Now, let me again stress this so it will be perfectly clear. As I said before, no contention is made that USG or its licensees violated the law in selling at prices fixed
4080 by USG, to dealers. You may therefore assume, for the purposes of this case, that in so far as USG controlled the prices of its licensees to dealers, it was merely exercising that unusual privilege accorded by the law to a patentee. That, however, does not mean that the licensees' scheme and operation was not unlawful."

Then after that he went on to describe the alleged illegality charged in that criminal case, of control of resale prices.

Now in the other volume, Volume 2, Mr. Kelleher said, at page 671:

"Your Honor, I wouldn't raise this objection, because I understand the reason Your Honor has admitted that testimony about commission men. Of course, we don't charge that the elimination of commission men among the licensees was illegal."

Then Judge Goldsborough said, at page 672:

"Of course, I am sure that the jury understands that there is no issue between the Government and the defendants in connection with the defendants' relation to the licensees; no issue in this case at all."

We think, reading the whole of the statement of Mr. Kelleher, that it is clear he was not making a concession except for the purposes of that case, and was limiting the attention of the jury to the issues in that case.

4081 Now, however, on the second question, as to whether or not this complaint charges that these agreements and the practices thereunder are illegal, we would like, if possible, to defer ruling upon that.

I will state frankly that I am still in some doubt upon that subject. My colleagues, perhaps, have reached a conclusion, but I am in some doubt upon it, and I would like to hear a little further from the Government, and perhaps briefly from the defendants, to help me clear up my doubt.

I will say first to the defendants that the contention made by the defendants this morning came to me as somewhat of a surprise. Perhaps I have been obtuse about understanding the defendants' contentions. I do recollect the defendants contending in one or two instances heretofore that the complaint didn't charge these agreements to be illegal upon their face, and yet I have had the impression throughout this case that it was pretty generally understood there were two issues here, two outstanding issues: (1) whether or not these agreements, and the practices under them, transcended the proper limitations of the General Electric doctrine; and, (2) whether, even if they did not, they were mere subterfuges.

As I understand the General Electric case, it is that a patentee may, in a license agreement, impose conditions and terms of sale, including prices, but not necessarily

4082 restricted to prices, provided they are within the reasonable limits of the patent monopoly protection. And I supposed that one of the issues of law in this case was whether or not the terms and conditions of these license agreements, including these bulletins, including the various practices such as limitation of area and basing point provisions, freight charges and limitation of quantities sold, and amounts to be loaded into trucks, and the like, were within or without the proper limits of reasonable protection of a patent monopoly, and that therefore we would have to

hear what these practices were in operation, so as to test their reasonableness.

But then I thought that the second contention of the Government was that even if these practices were technically legal, they were all entered into merely as a subterfuge and cloak, and not in good faith, for a general stabilization scheme.

It seems to me—my memory may have failed me—that the license agreements came into evidence without objection, and that the bulletins and these various other practices we have been hearing about here, have come into evidence without objection, except the usual objection. I therefore had the understanding thus far, Mr. Bromley, that there wasn't any question as to those two issues being in the case.

But I can see how I may have been misled—and I
4083 don't use that term, of course, invidiously—I may have been obtuse or I may have been inadvertently misled. It may be that the defendants' theory was that this evidence was all coming in only under the subterfuge issue, and not under the illegality issue.

But since your informal argument was made this morning, Mr. Bromley, I will say to the Government that my mind has been cast into some doubt on the question whether or not this complaint does charge illegality in the license agreements and the practices thereunder.

4084 Paragraph 45, it is true, charges a general conspiracy in violation of the Anti-Trust Laws, and in paragraphs (a) to (e) in general terms is stated the manner and effects of the combination and conspiracy charged.

But paragraph 46 says that, "Said combination was entered into and has been, and is being, carried out by the defendant companies in part under the guise of numerous license agreements purporting to relate to the use of certain patents owned by the defendant USG in the manufacture of gypsum board. To give color of legality to such combination, the defendant companies, and other companies hereinafter named, concertedly agreed among themselves to enter into, and did enter into, said license agreements. Said license agreements are not bona fide patent license agreements reasonably designed to secure to USG the pecuniary reward for valid patent monopolies, but were entered into and executed for the illegal purposes described in paragraphs 44 and 45 hereof".

Now it would seem to me that fair pleading—and I use that term as a term of art, and not with any reflection upon

whoever may have drawn this complaint—it seems to me that fair pleading might arguably have required the Government, if it is charging two things, to have said those two things in terms, and to have said, "We charge not only that these were not bona fide patent license agreements, but also
4085 that they were illegal agreements, and that the practices under them were illegal, even if they were entered into without subterfuge".

Upon examination of paragraph 91 of the complaint, where the control of prices and terms and conditions of sale for gypsum board are stipulated and set out in detail, I fail to find any place in that paragraph, or in subsequent paragraphs in the complaint, exclusive of the prayer, which, in terms, anywhere says that those conditions and practices under the license agreements were illegal.

As to the prayer, paragraph 3 asks the court to adjudge and decree that each of the license agreements is in violation of Sections 1, 2 and 3 of the Sherman Act, but that is a prayer which would be proper even if the sole charge was that the license agreements were entered into as subterfuges.

Of course the sixth paragraph of the prayer, as amended, and the fifth paragraph, asking cancellation of the provisions of the aforesaid license agreements which authorize price fixing and royalties, and contain the other prohibitions and conditions referred to, and which restrain or seek to restrain the defendant companies from entering into any license agreements containing those provisions, smack more of illegality than of subterfuge.

But it seems to me that the complaint, in terms, does not charge these license agreements as being a violation of the Sherman Act so far as the General Electric case is concerned.

4086 Now of course you can argue to the contrary, that the Government is entitled to prove what is alleged in its complaint. There has been no motion to strike out of the complaint anything as surplusage, and the Government is entitled, therefore, to prove the allegations of paragraph 91 and the practices under it, since it has charged those practices, and then ask the Court to draw the conclusion that they are illegal, for any reason.

It may well be that the complaint is broad enough, when you read paragraph 91, and the prayer, and paragraph 45, all together, to fairly advise the defendants that they are charged with these two things, illegal agreements and illegal practices under them; and subterfuge.

I confess that my mind is somewhat in a state of doubt on this, and I don't like to make a ruling when it is in a state of doubt.

I don't mean to say that I have any doubt—Judge Jackson thinks I have misspoken—I don't mean to say that I have any doubt that the complaint does charge that the agreements were subterfuges. The complaint charges that in terms.

But I have some doubt myself as to whether the charge is made in the complaint that the agreements were, aside from the question of subterfuge, illegal because they went beyond, and the practices under them went beyond, the protection accorded under the General Electric doctrine.

4087 I have some question also—perhaps this is a little academic before we get to the actual ruling—I have some question also, if this complaint does not charge that these agreements are themselves illegal, and the practices under them are illegal because going beyond the proper limits of the General Electric doctrine whether or not this evidence that is being offered now, if it must be looked at purely in terms of the subterfuge charge, is any evidence of subterfuge.

It seems to me—I say this with reservation because it may be connected with other evidence which might put a different light upon it—but it seems to me it would prove the opposite of subterfuge. It seems to me the evidence that there were detailed bulletins sent out, and that there were constant corrections and changes of those bulletins, the evidence that there many meetings held at which the United States Gypsum Company insisted that the terms of these agreements be kept, and at which it complained about large numbers of violations of the agreement, and the evidence that a great many complaints were made by the defendants against each other—would tend to prove that they were taking these agreements very seriously and insisting that they be abided, rather than treating them as a sham and a cloak.

But it may well be, of course, that I am looking at the matter too partially; it may be that your claim of
4088 subterfuge is based upon some other evidence that the Government has to offer with respect to the attitude of the defendants towards these agreements, and my mind is entirely open upon that subject. I am not ruling that the evidence is not admissible at the present time on

the theory of subterfuge, and my colleagues are both agreed that it is. I am inclined to think it is, subject to connection.

Looking at it alone, without connection, it would seem to me to be doubtful proof of subterfuge, but more inclined to be proof to the contrary.

I state these things very frankly because I always want to open my mind to counsel on both sides, so that they can have a full chance to convince me of my errors, if any. I would like to avoid a ruling for a few days, if possible.

(Justice Jackson conferred with Justice Stephens.)

I have made it perfectly clear, I think, that we all agree, and I don't understand that there is any contention by the defendants, Judge Jackson, that the complaints do not charge subterfuge; we are agreed that they do. Clearly the complaint does charge, in paragraph 46, that these agreements were subterfuge.

Justice Jackson: And the exhibits are properly admissible under that charge.

Justice Stephens: I think they are properly admissible, provided they are properly connected with other
4089 evidence which will show subterfuge.

Justice Jackson: Of course the evidence has to come in piecemeal.

Justice Stephens: That is right.

As to the other question, as to whether or not this complaint charges a violation in the license agreement, if there is some way to avoid an immediate ruling on the subject so that I can think about it further, and have a little more discussion on it by counsel, I would like us to do that, because I think counsel are entitled to a vote by all three of the Judges on the subject.

Will there be any difference between this evidence that you are now offering, so far as it relates to subterfuge and the evidence so far as it relates to illegality? If not, we can hear it all and then we can later hear whether or not it is applicable to the illegality charge if the complaint is ruled to contain an illegality charge, and the defendants could be protected if we take it all in now, by reserving the right to move to strike it out so far as it applies or may be said to apply to the charge of illegality, if the Court should rule that the complaint does not contain a charge of illegality.

Do you see any objection to that, Mr. Bromley?

Mr. Bromley: No, sir, I think not. It seems to me that that can be done all right.

While our minds are on the precise point, I would
4090 like to say something that I didn't say this morning.

My position has always been that under paragraphs 90 to 92, inclusive, the evidence contained in the license contracts and in the bulletins, to which I did not object, was material because, while there is no charge of any illegality so far as price fixing by the licensor upon the licensees is concerned, the theory of this bill of complaint is that these lawful controls, exercised by the licensor upon the licensees' prices, were carried over into unlawful fields.

Now if you look at paragraph 96 you will see that it says at the very outset:

"The control by USG of gypsum board manufactured by its licensees, described in paragraphs 90 to 95 hereof, has been exercised from time to time throughout the period from the year 1929 to the date of filing this complaint upon gypsum board of the licensees not covered by valid patents involved in the license agreements", and so forth.

There is one charge that has directly to do with these bulletin provisions, not that they were unreasonable to the extent that they affected the licensees' price, but that they were carried over to material not covered by the license agreements. The same thing appears in paragraph 103 where it is alleged, in the second sentence, that from time to time we carried the terms and conditions in the bulletins to plaster and other products that were not properly, of course, subject to price control, because unpatented.

4091 Also, in paragraph 108 it is alleged that:

"Throughout the period from the year 1929 to the date of filing this complaint, U.S.G. and its licensees have, by concerted action, induced and coerced manufacturing distributors purchasing gypsum board from U.S.G. and its licensees to resell said gypsum board to dealers and consumers at the bulletin prices determined and fixed by U.S.G. for sales of board by its licensees to dealers and consumers, as described in paragraph 91 hereof".

So that I conceived of the license agreements and the bulletins as being quite material, because the Government was going to prove, not that it attacked them because they controlled the licensees' prices, or because they were unreasonable, not that they did that at all, but that the conspiracy was to carry those lawful terms and conditions into fields where the law didn't protect us, like purchased board, like the resale price of manufacturing distributors, like the

sale prices of plaster and miscellaneous products that were not covered by any patent.

Now if the complaint had charged what I say it does not charge, that these terms and conditions in our price bulletins went too far in themselves, vis-a-vis the licensees, wouldn't the complaint have said, in terms, "Well, USG, you had the right to fix the price"—when the Govern-
4092 ment listed all these things from (a) to (u) on page 23, and paragraph 91, where they list all these prohibitions of the bulletin—wouldn't you have thought that any fair pleader would have said, "Why it is all right for USG to fix a price, that is contained in subparagraph (a) here, but when we get down to (d), specified areas in which dealers may pick up, that is unlawful because it is unreasonable."

But the pleader doesn't make any differentiation in any of these things from (a) to (u). He says, "Here is what USG did, it fixed the price and the terms and the conditions of sale".

Of course, all you have got to do is to read these things to see that they all have to do with price, they all affect price, they all are prohibitions against ways in which licensees could evade a fixed price by rebating or doing something else that would affect the price fixed by USG.

Justice Stephens: You contend, I assume this is dehors the present argument, but just to be clear—I suppose you contend that even if the complaint does charge those things to be illegal, that they were legal for that reason—because they relate to price.

Mr. Bromley: That would be our fundamental legal argument, and the General Electric case said that you could fix any term and condition that had a reasonable relation to price.

So that first I find no charge that these specific
4093 things that were regulated by the bulletins went beyond price. The pleader doesn't draw any line, he lumps them all together. He says, "Here is what USG did under its asserted right to control prices". As I read the complaint, the Government doesn't attack that at all. But it does go on to say that having set up this lawful scheme to control the licensees' prices, the licensees who manufactured these goods under the patents, these defendants got together and extended it into several fields which were plainly unlawful, and that they tried to extend it into resale price fixing.

Well now, of course our position is that we had no right to control resale prices. We don't dispute the Government about that. If we did control them, we were wrong. We say we did not control them and we never attempted to exercise any control except upon the price of our licensees. Now the complaint definitely charges that we did try to control resale prices. It definitely charges that we tried to control plaster prices and prices of other unpatented products. It definitely charges that we tried to control the price of board that wasn't subject to the licenses in the sense that it was purchased by the seller, and not manufactured.

So the reason I didn't object to the licenses and to the bulletins, was that I thought they were material to what was the heart of this complaint.

In all that I have said now, I have left out of con-
4094 sideration the subterfuge argument which I think is perhaps as important a charge as this.

I agree that they did charge us with setting this thing up as a phoney scheme, not intending to exercise our legal rights, but setting it up as a subterfuge, and that we never carried it out.

The reason that I may sometimes in my statement have been confused about the existence of the issue of which your Honor speaks, is that I sometimes think that when the Government gets into the Supreme Court it may say, and it may have a right to say, "Well, let's forget about all the evidence in this case, we want you to overrule the General Electric case", and if the Supreme Court overruled the General Electric case, whether we had this complaint or any other complaint I guess our whole defense would fall.

But I have been confused between whether they could do that because it is charged in the complaint, which I do not think to be the fact, or whether they could do it just anyway, saying that the General Electric case was wrong and that a patent owner hasn't the right to control prices at all.

I sometimes have not drawn the distinction clearly because I have always felt that they probably could argue that some day and probably would. But I don't think that changes the fact that the complaint does not charge that

these regulations of ours are unreasonable in any
4095 particular whatsoever, and all that the complaint charges is that they were unlawful because they were extended into fields where we had no right to extend them, like the resale price field.

Justice Garrett: Mr. Bromley, may I ask you this. Referring to paragraph 91 of the complaint, and the detailed statements under that, in so far as those detailed statements relate to board manufactured under the patents I suppose the defendants would admit that, wouldn't they, in so far as it relates to board?

Mr. Bromley: Yes, I think we admitted it in our answers.

Justice Garrett: I thought so.

Justice Stephens: That is, you admit that you did apply these terms and conditions of the license agreements set out in paragraph 91 to the sale of board manufactured under the license?

Mr. Bromley: Yes, those are summaries of them. We admit them as set out in the bulletins.

Justice Garrett: That is the way I understood it.

On the question of subterfuge, I expressed myself with my colleagues when we were consulting this morning, and I would like to say this in justice to myself.

I am somewhat doubtful about the relationship of subterfuge to the question of the legality of the license agreements. In other words, I don't quite understand just what may be meant by the term "subterfuge" if that be
4096 separated from the question of legality of the license agreements. That is a doubt in my mind that I would like to hear Government counsel on.

I agreed, as the Presiding Judge said, that the testimony was admissible here under the subterfuge ground, but I should like to say that I agreed to that with the understanding that the question of whether subterfuge, as a matter of law, would affect the legality of the license agreements, was a question to be determined as a matter of law by this Court eventually at the end of the case.

Now I perhaps have not made myself clear, and I do not know that there is any particular disagreement between us about that, but I felt—

Justice Stephens: (Interposing) I would be glad to hear argument of that sort myself. I have understood, Mr. Steffen, that the drafter of this pleading was intending to charge subterfuge. Perhaps I should say it this way. It seems to me that it would have been possible for the drafter of a pleading like this to charge two things: First, that these agreements and the practices under them were illegal because they went beyond the reasonable protection of a patent monopoly; but second, that even if they did not go

beyond the reasonable protection of a patent monopoly, they were not entered into in good faith, that the defendants did not regard them as binding, for one reason or
4097 other, did not regard them as having any real foundation, and the defendants extended them to fields beyond the fields which are within the proper purview of the General Electric doctrine.

As I said, I had been under the impression that the parties on both sides of the case were trying this case on both of those issues, but as I reexamine the complaint now, in the light of this morning's argument, my mind has doubt as to whether or not there is a charge of illegality in the agreements themselves and the practices under them by the licensees themselves, on their manufactured board, as distinguished from extending the application of the agreements to resale price fixing, purchased metallized board, and such other items.

I would like to hear you briefly, on the Government's side, on the doubts that arise in my mind.

It does seem to me, frankly, that it would have been fairer—and I use the term as a term of art in pleading, and not as a term of criticism—to make the complaint much more specific or explicit than it is, so we could all be advised more explicitly than we have been.

It may well be that the complaint is broad enough as a matter of law, to support both charges.

Mr. Bromley: I made an error in my statement which I had better correct now, if I may, if the Court pleases.

When I talked about the complaint charging an illegal extension of the bulletin provisions to the field of
4098 purchased board, I should have said purchased metallized board, so far as the complaint is concerned.

Mr. Steffen: I would like to talk very briefly, your Honor, and I hope I will be able to get our position rather clearly stated.

On the matter that came up just now, that the particular issue was a fairly narrow one of whether Mr. Lenci could testify concerning some complaints that were registered at the time of a licensees' meeting at which all of the licensees and the licensor were present, there is no question I take it, in anybody's mind, but what that is literally stated, I will not say charged, but literally stated in paragraph 92 of the complaint:

"The licensees frequently have filed complaints with U.S.G. of alleged violations of bulletin prices by other licensees and U.S.G. has, through the aforesaid agencies, regularly investigated said complaints. U.S.G. and its licensees have held numerous meetings at which the prices and terms and conditions of sale prescribed by U.S.G. in said bulletins and at which complaints of violations by licensees of said bulletin prices were discussed for the purpose of obtaining adherence by the licensees to said bulletin prices."

Now the question that seems to be causing trouble is whether or not there is any charge of illegality in connection with that recital, and whether that can come in
4099 as evidence on any issue which is properly within the terms of the complaint.

Clearly we have given notice of that particular matter, and there is no question on that score.

Now that gets to the question of what are the charges in the complaint, and why would that be relevant to establish or prove a charge in the complaint.

Now in the discussion so far we have not mentioned what the Government has consistently regarding as being the charging paragraph of the complaint, which is paragraph 44. That is the only place where we say that anything is wrong. I mean that you can search the complaint all the way through and you will find that is the only place.

Take resale prices, we don't say that that is wrong; we don't say that standardization is wrong—I mean with adjectives.

We said that it was wrong in paragraph 44, we said that these defendants have conspired to restrain trade, and that these defendants have conspired to monopolize the gypsum industry.

Those are the charges, those are the assertions of wrongdoing.

Then we have related in considerable detail the particular wrong-doing in which we find the defendants engaged, and among them, as Mr. Bromley has said, is that there is price fixing, which of course is the essential charge
4100 here; there is resale price control on the part of the manufacturing distributors; there is standardizing of the product for the purpose of, in effect, monopolizing it; there are a number of matters, such as we are developing here, concerning the means of sale, the amount of board

you can put in a truck, the territory where you can sell, and all those matters are related as things which constitute, we believe, restraints within the charge of the complaint that the defendants have restrained trade.

Then we have related the whole series of different things which constitute restraints. Take the basing point matter, for example, that alone is almost enough to base this whole complaint on.

These defendants, under paragraph 44, are charged with restraining trade in violation of Section 1; under paragraph 45 we say they are doing it for the purposes of dominating and controlling the distribution of gypsum products throughout the Eastern area.

Then we proceed to say, in paragraphs 47 to 119, in detail, what they did by way of carrying out or effecting those charges which are made in paragraph 44, the charges of wrong-doing.

And this evidence here that we are offering is extremely relevant, it seems to me, for purposes of showing that the defendants were going to great lengths to control
4101 the pricing, the discount terms, and everything, practically, having to do with the business. That is a control of distribution as we see it within the general charge of the complaint.

Now let's take the matter of the license agreements, You can see from that, that the license agreements are subordinate. They are one of the means by which the defendants have been enabled to control the whole industry that, we say, they have controlled.

We don't say that that is, per se, an offense. The offense is charged in paragraph 44.

I can give you an example. Suppose the defendants all got together and they said, "Now what we want to do is dominate this industry, we want to stabilize prices, we want to standardize goods, we want to eliminate competition, and so on—how can we do it?"

Well, somebody says, "We have got a General Electric case that says if you can find a patent, and you can all agree to take out a license under that patent and pay nominal royalties, then we are within the law".

That, looked at all alone, might well be within the General Electric case. I mean it might be a nice little patent licensing agreement. Yet the whole thing might be done for purposes of subterfuge, for purposes of controlling the entire industry as we have charged here.

Therefore, it isn't the subterfuge which is, per se,
4102 wrong, it is the fact of what they did with their subterfuge, the license agreements.

That covers getting into the agreements. We will now take a look at what they did. They didn't even get into a valid agreement, as we see it, they got into license agreements that, as we see them, go much farther than anything allowed in the General Electric case.

The agreements provide here, as we relate in paragraph 91, that they can fix minimum price, they can specify delivery zones, they can do anything from (a) to (u), and there is nothing in the General Electric case, as I read it —that is a matter of law for the Court to decide—which would say that that is a valid license agreement within the protection afforded by the General Electric case.

Note that this is a matter of defense. We make our charge that they have violated the Sherman Act by doing various things, and that the license agreement was a subterfuge to that end.

Then the defendants come in, as part of their affirmative defense, and say "But we have got the General Electric case, we have got valid license agreements".

We then say, more as an argument to meet their affirmative defense—maybe it is out of turn here, it might be a criticism—but in order to meet that defense we say that that same evidence is useful to show that they
4103 didn't even come within the General Electric case, that it doesn't even allow them to get such protection as the General Electric case might provide.

So far as any effort on our part to upset the General Electric case is concerned, we have said, and I would like to reiterate it again, because Mr. Bromley brought it up, we have said very explicitly that we do not seek to upset or overrule or to change the General Electric case. That is said on page 45 of the trial brief to the Court. We said there:

"The Government in the present case has no purpose to overthrow the General Electric holding. But it is respectfully submitted that the pattern of the present combination of manufacturers is much more clearly akin to that held illegal in the Masonite case than it is to the situation in the General Electric case".

That is, that the General Electric case, as we see it, doesn't apply to this situation at all.

If it did apply to this situation, I mean if they had kept within the allowances given them under the General Elec-

tric case, still they could have used a perfectly nice looking patent and patent licensing agreement, well within the terms of the General Electric case, for the purpose of getting general control.

All our evidence up to the present time, or pretty nearly the present time, as to demoralized conditions and
4104 everybody getting together on May 22nd and May 23rd, all coming in on the same agreement, was all designed to show that their main interest there was to get under the shelter of something or other so that they could get price fixing, and not because they were primarily interested in the particular patents. They were interested in closed-edge board, certainly, but they were also interested, and much more so as we contend, in getting under the shelter of price control, so that they could stabilize their business.

That is the evidence of subterfuge, not the only evidence but the first evidence of subterfuge.

Now as to Judge Garrett's statement as to subterfuge and illegality, have I made myself clear, Judge Garrett, that the agreements might be legal in some sense, and still they might be used as a subterfuge?

Justice Garrett: I think I understand your position.

Justice Stephens: I have had a little difficulty with that myself, unless you spell it out on this theory.

If you say the agreement is legal—assume that for the moment, assume that there is, to use your phrase, a little agreement sufficiently narrow to be within your contention with respect to the General Electric case; and you say, "Let's assume that that is legal".

Now how can it be legal and also be a subterfuge unless one of two things has occurred: (a) it is carried
4105 beyond, in actual practice—though legal on its face—it is carried beyond in actual practice its face, and is applied to items which are clearly beyond the proper limits of a patent licensing agreement under the General Electric document; or (b), unless, although it is legal on its face, it was just a fixed-up agreement in which no one had any really serious intentions, that the parties went through a mere form of signing an agreement which, though legal on its face, was regarded by all of them as a mere form and without any proper foundation.

Now except in those two ways how can you think of a legal agreement as being subterfuge?

Mr. Steffen: I see your Honor's question, certainly.

Justice Jackson: That would be enough, to come under either one of those two situations, to make it subterfuge.

Mr. Steffen: Yes, but we still have a third.

The American Equipment Company case, which we cite on page 24 of our trial brief, had to do with this sort of a situation.

The brick people in Chicago decided that they wanted to stabilize their industry, and allocate certain quotas to different people. So they said, "Well, let's all take out a license under a particular patent having to do with a loading device". One of the conditions of that loading device patent agreement was that they should not load more than a certain amount in certain territories.

4106 The Court said that looked at all alone, the patent might have been all right, but when used for the purpose of allocating territories between the brick people, that it was being used for purposes which the Sherman Act condemns. The Court said "We will disregard the patent and the license under it, and say that what you really are doing is trying to stabilize and regulate your industry."

Justice Stephens: That is my category (a).

Mr. Steffen: All right, that is a good category. What was your category (b)?

Justice Stephens: That although the defendants entered into a license agreement which, on its face, was legal, they entered into it merely as a matter of form and without any good faith, and without a belief that it had a proper foundation.

Mr. Steffen: And the third, I think, your Honor, is one of the things that we are faced with here. A third category would be when they have entered into it and have gone completely beyond the license agreement by their bulletins and regulations under it.

If you will read the license agreement it just says that the licensor reserves the right to fix minimum prices, and that sounds simple enough.

Justice Stephens: Don't you regard the bulletins as really a part of the license agreement?

4107 Mr. Steffen: We regard them as going completely beyond the price terms in the license agreements.

Justice Jackson: Don't they refer to the license agreement in the opening paragraph of each bulletin?

Mr. Steffen: Yes. They are an outgrowth of it, certainly, but I think they go beyond—

Justice Stephens: (Interposing) You mean if considered a part of the license agreement or if considered as separate, beyond the proper limits of the General Electric case; but you do consider, don't you, from a factual standpoint, that the bulletins and the directions sent out in connection with the bulletins, were really part and parcel of the license agreement?

Mr. Steffen: I don't know what is tied up with that. I say they are an outgrowth of the agreement. I think they are an extrusion that got 'way off from the agreement, and it is certainly not, as Mr. Bromley says, a simple exercise of the fixing of prices. It seems to me that they went much beyond that, although they did it under the cloak of having a license agreement and a provision to fix prices.

The question is of great importance to us, certainly, and I hope that we may be heard again in more detail, if necessary.

Justice Stephens: Well, thank you, Mr. Steffen.

Do you wish to reply, Mr. Bromley?

4108 Mr. Bromley: No, your Honor.

Justice Stephens: Well, we thank counsel on both sides.

We will then proceed to take this evidence.

The Court rules that the class of evidence which we have been dealing with is admissible, subject to connection, on the theory of subterfuge, and will receive the evidence so far as it may be said to apply to a charge of illegality, as distinguished from subterfuge, subject to a motion to strike if the Court should later determine that the complaint does not involve a charge of illegality.

(Justice Stephens and Justice Jackson conferred off the record.)

Justice Stephens: One of my colleagues has some doubt as to the clarity of that ruling. I will therefore add that it is not intended to indicate that if the evidence be stricken out to the extent that it is offered as applicable to the charge of illegality, it would also be stricken out as far as the charge of subterfuge is concerned.

4109 Mr. Steffen: Mr. Knuff points out that I neglected to state to the Court that Paragraph 44 expressly states that the defendants are parties to illegal contracts, and of course, in our prayer we are asking for either the cancellation or the modification of the contracts. The very first sentence in Paragraph 44 is squarely on that point.

Justice Stephens: What do you say to that, Mr. Bromley?

Mr. Bromley: I say that that is the same thing all over again. I assume that if they prove we carried our lawful price restrictions into unlawful fields, that we would all be parties to unlawful contracts.

Justice Stephens: Well, we will proceed, gentlemen.

By Mr. Knuff:

Q. Mr. Lenci, at the November 15th meeting, the meeting of November 15, 1932, was there a complaint discussed at that meeting concerning certain dunnage that was sold by either Tomkins, Tomkins Rockwall, or some Tomkins company? A. Yes.

Q. What was the nature of that complaint? I am very sorry that I can't make my question any clearer, but I can't do it because the memorandum that I have in front of me doesn't indicate whether the dunnage was sold by Tomkins Rockwall, or what Tomkins company it was. Now, can you clarify that for us? A. Well, it happens I can, in that case, because that was m own particular complaint.

4110 Q. What is that? A. That was our own complaint. We were complaining that the Atlantic Gypsum Company—you will see the reference there to Mr. Neale, he was their manager—that the Atlantic Gypsum Company were including in shipments to either Tomkins Brother or Tomkins Rockwall Company, dunnage board of a quality which enabled Tomkins to resell it, which was in effect a rebate or a cut in the price, and which put us at a disadvantage.

Q. The Atlantic Gypsum Products Company was selling to the Tomkins Rockwall Company, is that correct? A That is correct.

Q. And in turn—I don't want to transgress and repeat—

Justice Jackson: (Interposing) Go ahead, you have your own style, Mr. Knuff. Don't feel that you are circumscribed at all.

Justice Stephens: We don't want you to feel self-conscious, Mr. Knuff. Just try and save what time you can.

Justice Jackson: I just made that as a suggestion.

Mr. Knuff: I do want to have the record clear.

By Mr. Knuff:

Q. Tomkins Rockwall in turn were reselling that
4111 to customers, is that correct? A. Yes, but that isn't what we were interested in.

Q. What were you interested in? A. We were interested in the fact that the Atlantic Gypsum Company, a licensee,

was shipping dunnage board which was, in effect, first-class board, at no cost to the customer, which was a violation.

Q. And who referred the problem to Mr. Neale to investigate, if it was referred to him? A. Well, my recollection is that I made my complaint, of course, to the United States Gypsum Company, and that Mr. Henning asked Mr. Neale to investigate it.

Q. And Mr. Neale said he would investigate it? A. Yes.

Q. Now was there any discussion as to how this problem of dunnage was to be handled in the future? A. Well, that first complaint led to the second notation which I have on my list, that all of the licensees were asked by the United States Gypsum Company to mail to the Board Survey Company the details of just how much dunnage they were putting in these cars, and what kind of dunnage it was, whether it was really dunnage which was board which was no good, or whether they were overloading their cars with good board and calling it dunnage, which was, in effect, a cut in price,

4112 Q. And Mr. Henning suggested, is that correct, that all the companies that were present there mail to him the details as to their practice concerning the use of dunnage; is that correct? A. That is correct, except that he said to mail it to the Board Survey Company.

Q. The Board Survey Company? A. Yes.

Q. Did he assign as his business reason for that, that the licensor would be guided by the practice as it would be detailed in the letters that they would receive? A. I didn't hear the first part of your question.

Q. I don't believe the question is very clear.

Did Mr. Henning say that the licensor desired this information so that it could formulate a consistent policy concerning dunnage? A. I don't recall whether Mr. Henning said he would do that or not, but I think he was anxious to get the information and possibly do something of that kind later.

Q. He made no statement as to that? A. No. In other words, he was collecting information.

Q. Now then, was there a complaint made by someone that the National Gypsum Company sold Maftex below their regular established price for Maftex, in con-

4113 nection with a sale of board?

Justice Jackson: What is Maftex?

Mr. Knuff: I was going to ask this witness. I don't know, myself.

The Witness: Suppose I answer that first. Maftex is an insulating type of board, a fiber board like Celotex or Insulite.

Justice Jackson: It is not a gypsum product?

The Witness: It is entirely outside of the gypsum industry.

There also was a complaint made by our company that the National Gypsum Company, in trying to make a sale of gypsum board to Axinn Brothers, were maintaining the price on gypsum board but quoting an unusually low price on the Maftex board which was, in effect, unduly influencing the sale.

By Mr. Knuff:

Q. And your complaint was that you wanted National Gypsum Company to maintain their established price for Maftex, is that correct? A. That would be the effect of it, yes. In other words, we didn't feel that they should take a material such as Maftex, which had a reasonably stable price—I am not familiar with the exact details—and suddenly make a low price on that to influence a com-
4114 bination sale of Maftex and gypsum board.

Q. What happened to that discussion? A. I see that there is a question mark after that. I don't know what disposition we made of that. I think we merely made the complaint, and Mr. Neale was to investigate.

Q. Mr. who? A. Mr. Neale. Mr. Baker, I mean.

Q. Mr. Baker was going to investigate that? A. Yes.

Q. You don't know whether Mr. Baker said that if National was selling Maftex below the established price, that he would see that that was discontinued? A. I don't recall what his statement was, if any.

Q. Was there any discussion concerning a man by the name of Sol Bloom? A. That isn't Sol Bloom.

Justice Jackson: He is in Congress.

The Witness: This is another S. Bloom.

By Mr. Knuff:

Q. This is an "S. Bloom"? A. Yes, this is S. Bloom. It probably was Solomon, but I am not sure.

Q. What was the discussion? A. That was a complaint—I don't know whether we made it or not, but it was one
that we were familiar with, because it happened two
4115 or three times. At that time there was a differential in effect between the price of board in straight carload lots and in truckload lots, and we made the complaint

that the National Gypsum Company had shipped a carload of board to Brooklyn, and on arrival had trucked it to these three different customers of theirs, without any additional charge, which was, in effect, below the bulletin price.

Q. It was your understanding at that time that the license bulletin did not permit the manufacturer to pay for the transportation from the car to the dealer's warehouse? A. Not when the product was sold at the carload price.

Q. In other words— A. (Interposing) The carload price was lower than the truck price, and if the manufacturer included trucking and did the trucking service, he was, in effect, making a donation of the cost of the trucking, which was a violation of the price established by the bulletins, at that time.

Q. Between what points was the trucking being done, between the railroad car and the dealer's warehouse or between the plant of the manufacturer and the dealer's warehouse? A. The car was shipped from the National Gypsum Company's plant in Upper New York State, by rail, to Brooklyn, and sold f. o. b. car Brooklyn and billed at that price, and that is where the sale should have stop-
4116 ped. But in addition to that, they took the contents of this car and delivered it to three different dealers' yards, without further charge.

Q. I think I understand that now.

Justice Jackson: Does that mean from the railroad yards in Brooklyn over to Corona, Long Island?

By Mr. Knuff:

The Witness: Yes, sir.

Q. Was there any discussion concerning National donating some boards to Feldman Lumber Company? A. There was, but I don't remember that that was our complaint. That was a complaint in connection with the matter of advertising, that is, giving away boards for completing work in a customer's office. This happened to be a very small one, it was only 7 boards involved.

Q. Was there a complaint concerning the—I am sorry, I can't make out your writing any better, Mr. Lenci— A. (Interposing) The Cinder Products Company.

Q. (Continuing) —Cinder Products Company of Syracuse, and if there was any complaint who made it and what was the nature of the complaint? A. I don't recall who made the complaint.

Q. Do you recall the nature of the complaint? A. It is

my recollection that at that time—no, I am not sure, I don't want to say that, because I am not certain. The gist
4117 of it is that there was a sale below the minimum established at that time by the bulletins, by Certain-teed.

Q. That is not a sale below the minimum price, but a sale—A. (Interposing) Of a smaller quantity.

Q. Of a quantity less than the minimum quantity? A. Less than the minimum established at that time.

Q. Was there any discussion concerning the Structural Gypsum Company selling some board to S. Bloom? A. That was a complaint that we made, that the Kelley Plasterboard Company must be selling Structural at a price which would permit them to make very small deliveries.

Q. What do you mean by that? A. Well, the complaint was that the Structural delivered 2970 square feet of board to S. Bloom. Well, of course, these things aren't complete. These are merely headings on this exhibit. But we felt that if Kelley had charged the correct price to Structural, there would have been no margin in it for them to make such a small delivery.

Q. Well now, wasn't your complaint along this line, Mr. Lenci, that under the license bulletins the licensor prescribed certain minimums that could be sold, and your complaint was that the Structural Gypsum Company was not complying with those minimums, and that the Structural Gypsum Company sold 2970 feet to S. Bloom? A.
4118 Yes, that is to a certain extent correct, but it goes back to the fact that they must have had some special concession from Kelley to enable them to do that.

Justice Jackson: You mean they couldn't have sold such a small quantity?

The Witness: Yes.

By Mr. Knuff:

Q. You say that you objected to Structural selling less than the minimum quantity provided in the bulletins? A. No. My complaint was against the Kelley Company for permitting Structural to get themself that advantage.

Justice Stephens: We will take a recess at this time for five minutes.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

Justice Stephens: You may proceed.

By Mr. Knuff:

Q. Mr. Lenci, at the trial in the District Court on October 16, 1941, with reference to Structural selling 2970 feet to S. Bloom, do you recall that you were asked concerning that down there? A. Yes.

Q. And you explained the meaning of that transaction in this language, and I am reading from page 509, Mr. Bromley—

4119 Mr. Bromley: (Interposing) It seems to me that this ought to be shown to him, if it is being used to refresh his recollection.

Justice Stephens: Show it to the witness. Mark it out and show it to the witness.

Mr. Knuff: This isn't Grand Jury testimony.

Justice Stephens: That is very true, but you are just using it to refresh recollection, so it isn't coming into evidence itself.

Mark the beginning and the end so that we can see it.

Mr. Knuff: The witness is being handed his testimony before the District Court, given on October 16, 1941, and has been referred to page 509 of his testimony, beginning with line 16 and ending with line 23.

Will you read that, Mr. Lenci, please, to yourself?

Justice Stephens: Show it to Mr. Bromley.

Mr. Knuff: Mr. Bromley, I believe, has it in front of him.

Justice Stephens: Then show it to the Court.

(Testimony handed to the Court for examination.)

Justice Stephens: Proceed with the examination.

Mr. Bromley: I object to showing only this particular excerpt from page 509, and ask that the witness be permitted to read the rest of page 509 and down to line 10 on page 510.

4120 Justice Stephens: The witness should be allowed to read the whole of his testimony on that topic, and he may do so.

Mr. Knuff: I haven't any objection at all.

Justice Stephens: I am sure you haven't.

Mr. Knuff: I thought that was a complete statement.

(Witness handed testimony for examination of additional portion.)

By Mr. Knuff:

Q. You have seen your previous testimony, Mr. Lenci, have you not? A. Yes.

Q. Does that refresh your recollection any more definitely? Has your recollection been refreshed? A. Yes.

Q. Now what was the complaint that was registered as to Structural selling 2970 feet to S. Bloom? A. Well after reading that testimony there—you must realize that I was the first witness in the criminal case, and naturally I couldn't go through the 6 weeks of that case without picking up additional information and having my memory refreshed in various ways; and with what I know now, I believe the statement I made today is more nearly correct than the one I made in the criminal case.

Q. You think, then— A. (Interposing) And if I might go a little farther, I think if you will see what is on
4121 the following page there, it ties it up with Kelley, which is what I said in my answer a few minutes ago.

Q. In the fall of 1932, were you not under the impression, Mr. Lenci, that the owner of a patent could fix the terms and conditions under which that patented article could be disposed of at resale? A. At one time I was, and I don't know up to what time that impression lasted, but I will be honest and say that I believe at a certain point that the ownership of a patent carried right through. I am not a patent lawyer, so I didn't know any different.

Q. And you were under the impression at one time that the owner of a patent could fix the price at which the patented article could be sold, and the terms and conditions under which it could be sold, down to the ultimate purchaser; isn't that correct? A. At one time I did believe that, yes.

Q. And at that time, didn't you believe that since the United States Gypsum Company was the owner of the patent, and that they had licensed Kelley to make the board, and Kelley in turn had sold it to Structural, didn't you believe at that time that that gave Kelley and the USG the right to determine the price and the terms and conditions at which Structural could resell that board? A. I
4122 don't know whether my misinterpretation of the patent law carried along to that late date or not. I don't know just when I learned better.

Q. You don't know whether it was at that time or not? A. I don't know whether it was before that or afterwards.

Q. But at one time you did believe just that? A. I did.

Q. I notice in the next to the last line on Government's Exhibit 478 for Identification, the word "Dusol" appears. That is the last word in the next to the last line. Did you have any discussion at that meeting concerning the L. A. Dusol Company—or is that "Dusol"? A. Unfortunately, there are two Dusols.

Q. There is a George Dusol, is that correct? A. I don't know.

Q. And an L. A. Dusol? A. "L. A." sounds familiar. I know there were two of them.

Q. And George Dusol was a salesman employed by the Kelley Plasterboard Company—don't you recall that? A. One of the Dusols worked for Kelley.

Q. And L. A. Dusol was a jobber in Brooklyn, isn't that correct? A. I am not sure whether he was a jobber
4123 or a lumber dealer.

Q. You are not sure? A. I am not sure.

Q. Can you tell us what the word "Dusol" refers to here? A. In this particular case, it was a complaint made by one of the licensees—I don't remember now which one, or whether it was a combination of several—that the Atlantic Gypsum Company's salesman, Mr. Grossman, had been handing out cash rebates to the various companies, lumber companies, mentioned here. Do you want me to say who they are?

Q. Yes. A. It was the Wagman Lumber Company, the Kings Highway Lumber Company, the Astoria Lumber & Trim Company, the Feldman Lumber Company, the Dusol Lumber Company, the Southern Lumber Company, the Williamsburg Lumber Company, and S. Skoblisky. And as part of the same complaint, someone made the complaint that Certain-teed and the Ebsary Company also were rebating to S. Skoblisky.

Q. This Dusol, then, appears just as one of the receivers of the rebate that was made by Grossman of Atlantic? A. That is correct.

Justice Jackson: You say those were cash rebates?

The Witness: Those were actually cash rebates.
4124 That is, the claim was that they were cash rebates.

By Mr. Knuff:

Q. Now, was there any discussion at this meeting on the 15th of November concerning the discount that should be allowed to manufacturing distributors? A. I don't know that there was any discussion. I think the licensor simply

said that there would be a change made, establishing the rate of discount at which gypsum board could be sold to other manufacturers of plaster products who were not manufacturers of board. Up to that time, I believe the discount had been 10 percent, and they now established a basis of 12-1/2 percent discount on lath and plasterboard, and 15 percent on wallboard.

Q. And previous to that, the discount had been 10 percent? A. As I recall it, up to that time it had been 10 percent. I don't know whether it was slightly higher on wallboard, or not.

Q. You don't recall whether or not there was any discussion concerning that? Your present recollection now is that USG made the announcement that there would be a change in that discount rate? A. Yes. I don't think there was any discussion.

Q. Now was there any discussion concerning the Upstate New York trucking situation? A. There must
4125 have been, because I have a memorandum here that the United States Gypsum Company was to make a recheck of that situation. But I don't remember what it was.

Q. You don't recall the discussion? A. I do not.

Q. I see our old friend Dusol is again mentioned in your memorandum. Was there any discussion concerning whether Mr. Dusol had ceased to do business as a jobber? A. I don't know if there was any discussion. Mr. Kelley made the statement that this particular Dusol—whichever one he was—was no longer a jobber being sold at a special discount as a jobber, but was being sold as a dealer.

Q. Was there any discussion concerning commission men? A. Yes. I am just trying to interpret my reference here. The reason I say that is that some of these names mentioned were not really commission men, but were jobbers. Abbey, Coeyman, Perry and Elhyde were in the classification of jobbers, and Colonel Lawton and Blanchfield were commission men.

Q. Can you tell us whether or not there was a discussion that thereafter there would be no more commission men employed in the gypsum industry? A. Subject to correction, I think that it was at about that time that the
4126 United States Gypsum Company issued a bulletin that the employment of commission men would be taken as a violation of the license agreements.

Q. That it would be considered by the United States Gypsum Company as a violation of the license agreements? A. Whatever the wording was in the bulletin.

Q. And your present recollection is that there wasn't any general discussion about that? A. I don't think so.

Q. Simply that Mr. Henning made the announcement at this time that commission men— A. (Interposing) Must be cleaned up.

Q. Blanchfield was a salesman employed by the Ebsary Gypsum Company on commission, was he not? A. He was employed by us with a substantial salary, and a bonus above that. By that, I mean he was not just a nominal commission man, but he had a real salary, and if he made sales above that he was entitled to a commission.

Q. And wasn't it the understanding at that meeting that your arrangement with Blanchfield should not be terminated until after Colonel Lawton's employment was terminated?

Mr. Bromley: I object to the question as incompetent so far as the use of the word "understanding" is concerned.

Mr. Knuff: I am asking as to his understanding of the discussion.

4127 Mr. Bromley: No, you said "wasn't it the understanding at the meeting".

Justice Stephens: Read the question.

(The question was read by the reporter.)

Justice Stephens: Objection sustained.

By Mr. Knuff:

Q. Was it your understanding, Mr. Lenci, that your arrangement with Mr. Blanchfield should not be terminated until after the company that employed Colonel Lawton terminated his services? A. It went a little further than that. We made the very definite statement that we would not make any change in our arrangement with Mr. Blanchfield until Colonel Lawton's situation was cleaned up.

Q. And Colonel Lawton was employed by whom? A. At that time, I believe he was representing the Atlantic Gypsum Company.

Q. On a commission basis, is that your understanding? A. That is my understanding.

Q. And in spite of the fact that USG had said that from now on the commission men would no longer be permitted under the license agreements, nevertheless you were not going to discharge Mr. Blanchfield until after Colonel Lawton's services with Atlantic were terminated? Is that

4128 correct? A. Yes.

Q. Was there any discussion concerning how Paragon of Syracuse and the American Hardwall Plaster Com-

pany were to be sold, that is, were they to be sold as jobbers or were they to be sold on a dealer basis? A. I am not altogether clear on that, but it is my recollection that Mr. Kelley, representing the Kelley Plasterboard Company, said that he would sell the Paragon Plaster Company of Syracuse, the Paragon Plaster & Supply Company of Scranton, and the American Hardwall Plaster Company of Utica, as dealers and not as jobbers.

Q. Is that quite correct, Mr. Lenci? Were the Kelley people selling Paragon of Syracuse or the American Hardwall Plaster Company or the other Paragon Company at all—weren't all those sales to Paragon and American Hardwall Plaster and the Paragon Plaster & Supply made by Oakfield? A. Not necessarily. I am quite certain that a great many sales were made directly from the manufacturer, in this case Kelley, to the ultimate consignee.

Q. You mean that the board was shipped by Kelley to the— A. (Interposing) Yes. And so far as I know, it was sold to them. The reason I say that, if you want to know why I say it—

4129 Q. (Interposing) Yes. A. (Continuing) —is because we did sell, at one time, one or two carloads to the Paragon Plaster Company in Syracuse, and the Oakfield Gypsum Products Company never entered into the matter at all, it was a direct sale from our company to Paragon. And I think maybe Kelley did the same thing.

Q. When you say you think that, you mean that that is you best recollection? A. That is my best recollection and information, yes.

Q. Now at that time, there was a man in Providence, Rhode Island, by the name of Cartier, was there not? A. Yes.

Q. And he was a jobber there, was he not? A. Yes; yes, he was a jobber.

Q. And there was some discussion that Mr. Cartier should no longer be continued as a jobber, but he should be sold as a dealer? A. I think at that time the Kelley Plasterboard Company were selling Cartier, and Mr. Kelley made the statement that he would sell Cartier, from that time on, as a dealer and not as a jobber.

Q. Well, there must have been some discussion concerning Mr. Cartier before Mr. Kelley got up and said, "I am going to sell Cartier now as a dealer." What was that

4130 previous discussion? A. I don't know, sir. Probably someone said, "What is the situation regarding Cartier?"

Q. When you say "probably", do you mean that that is your best recollection? A. Yes.

Q. And Kelley said, "I am now selling him as a dealer, not as a jobber"? A. Yes.

Q. The 7th line on the 2nd page has reference to exchanges or sales between manufacturers at less than the established minimum for Eastern territory. What was that discussion, Mr. Lenci? A. We had a warehouse in Newark, New Jersey, and the United States Gypsum Company also had a warehouse in Harrison, New Jersey, which was just across the river about a mile from ours. I believe at one time we were short of one particular size, and we asked the USG if we could go down to their warehouse and pick up a small quantity of this particular size in order for us to fill out a load to a customer. Mr. Henning said that he did not feel they wanted to make any exchanges between themselves or us, or to permit any exchanges between any manufacturer, of less than the minimum truckload that was in effect at that time.

4131 Q. And was the whole question of exchange, the policy with reference to exchanges, was that made the subject of a general discussion? A. I don't think so; I think that is simply something I asked him and he said, "That is what we are going to do."

Q. Then this notation that you have here didn't come up for a general discussion at that meeting? A. No, a lot of these things were not the subject of general discussions. They were matters where I would ask him, or someone else would ask him, and he would say, "This is what you have to do."

Q. You said that Coeyman and Perry and Elhyde were jobbers, is that correct? A. Yes.

Q. What was the discussion concerning them? A. Well, as I think I said before, it was just about at this time that the USG issued a bulletin to the effect that jobbers were to be sold at the same price as dealers.

Q. Well, that bulletin was issued in August of 1932 and this meeting took place in November of 1932? A. Yes.

Q. What was the discussion; why were they brought up at this time? A. I don't remember, unless the licensor asked some of the licensees whether or not they

4132 were still selling those people at the jobber price.

Q. You haven't any recollection, any definite recollection, as to what this note means? A. No; they were probably checking up on violations.

Q. I notice that there is a note here concerning Plastergon, Weyman and Allen—and I can't make out the next two words. What are those next two words? A. Central Plumbing Company.

Q. Was there a discussion concerning those? A. There must have been, but I don't remember what it was, now.

Mr. Knuff: We offer in evidence, if your Honor pleases, Government's Exhibit 478.

Mr. Bromley: Objected to as incompetent.

Justice Stephens: We think the witness has been testifying from presently refreshed recollection, and that the exhibit is not necessary in evidence. It is not received in evidence, it is excluded.

By Mr. Knuff:

Q. Did you attend a meeting at Chicago on December 13, 1932, Mr. Lenci? A. I don't remember.

Q. Could your memory be refreshed? A. I believe so.

Q. I hand you what has been marked for identi-
4133 fication as Government's Exhibit 479.

(The document referred to was marked for identification as Government's Exhibit No. 479)

By Mr. Knuff:

Q. Have you examined Government's Exhibit 479 for Identification? A. Yes.

Q. Does that refresh your recollection? A. It does.

Q. That is a four-page memorandum, is it not? A. Yes.

Q. In whose writing is it? A. In mine.

Q. When was it made, Mr. Lenci? A. Within a day or two after the meeting, I believe.

Q. That is, within a day or two after December 13th? A. Yes.

Q. Where was that meeting held? A. In Chicago.

Q. At the Palmer House? A. I am not sure, I don't remember whether it was or not. A good many of the meetings were held at the Palmer House but I don't recall whether they all were, or not.

Q. Was USG represented at that meeting?
4134 A. The United States Gypsum Company was represented by Mr. Henning and Mr. MacLeish.

Q. And what other companies were represented there, and who represented them? A. The Universal Gypsum & Lime Company was represented by Mr. Holland and Mr. Krumholtz; the Atlantic Gypsum Company was rep-

resented by Mr. Neale; the Kelley Plasterboard Company, by Mr. Kelley; the Ebsary Gypsum Company, by Mr. Ebsary and myself; Certain-teed Products Corporation, by Mr. Henley; the National Gypsum Company, by Mr. Baker; and the American Gypsum Company, by Mr. Black.

Q. And no person represented the Texas Cement Plaster Company? A. No.

Q. I believe at that meeting there was a discussion concerning the policy of the industry regarding sales of gypsum products through commission men? Am I correct in that assumption? A. I don't believe there was a discussion of it. I think Mr. Henning made the statement that now all of the commission men had been cleared up, or the situation regarding all commission men had been cleared up, with the exception of Blanchfield and Parker, and both of those men were our men. We said that we would now see that they were taken care of.

Q. And by "taken care of" you meant that you
4135 would change their status from commission men to men working on a straight salary, is that correct? A. Yes.

Q. And was that done? A. We did it with Blanchfield, and let Parker go.

Q. There was a complaint made by Mr. Kelley concerning the United States Gypsum Company soliciting Cartier of Providence, Rhode Island, was there not? A. Yes.

Q. What was that complaint? A. Well, you will recall that at the previous meeting Mr. Kelley said that he did not consider that Cartier was a jobber and that he would sell him as a dealer. Now at this present meeting Mr. Kelley made the statement that after he discontinued selling Cartier as a jobber, the United States Gypsum Company approached Cartier to make him a jobber.

Justice Jackson: Violations all around. (Laughter)

The Witness: Yes.

Justice Stephens: We will take the recess at this time until Monday morning.

(Whereupon, at 4:00 o'clock, p.m., the hearing was recessed until Monday morning, February 21, 1944, at 10.00 o'clock).

4136 IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA,

Plaintiff,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS,

Defendants.

Seventh Floor,
Internal Revenue Building,
Washington, D. C.,
Monday, February 21, 1944.

The above entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

APPEARANCES:

(Same as heretofore noted.)

4142 Justice Stephens: That may be stricken.

I should like to have it explained to me, either by the witness or by counsel, why it was contended to be a violation of the license agreements if there
4143 were exchanges of small lots of board between the licensees. It was testified by Mr. Lenci that one of the complaints made at one of these meetings was that one of the licensees was exchanging, with another, small lots of board. It wasn't clear to me why that was asserted to be a violation of the license agreement.

I don't know that it is material, but it is one of the things I didn't understand.

Mr. Bromley: Has Your Honor the place in the record where that appears?

Justice Stephens: I am afraid I didn't make a note of that. I think there were two places where Mr. Lenci testified that one of the companies would be out of a certain class of board and he would trade some other board for a small lot of the board that he was out of, and that that was complained about as a violation of the agreement.

Mr. Lenci: Page 4424?

Justice Stephens: Yes, there it is. Starting at line 9 it reads:

"Q. The 7th line on the 2nd page has reference to exchanges or sales between manufacturers at less than the established minimum for Eastern territory. What was that discussion, Mr. Lenci? A. We had a warehouse
in Newark, New Jersey, and the United States Gyp-
4144 sum Company also had a warehouse in Harrison, New
Jersey, which was just across the river about a mile from ours. I believe at one time we were short of one particular size, and we asked the USG, if we could go down to their warehouse and pick up a small quantity of this particular size in order for us to fill out a load to a customer. Mr. Henning said that he did not feel they wanted to make any exchanges between themselves or us, or to permit any exchanges between any manufacturer, of less than the minimum truckload that was in effect at that time.

"Q. And was that whole question of exchanges, the policy with reference to exchanges, was that made the subject of a general discussion?"

I didn't understand why that was alleged to be a violation of the license agreement. Perhaps it is not important. You may call the witness and proceed with the case.

Thereupon, GEORGE N. LENCI, the witness on the stand at the time of adjournment, resumed the stand and testified further as follows:

Direct Examination (resumed)

Mr. Bromley: As I understand it, if the Court pleases, I don't think there was anything in the bulletins about this, nor do I think it was a complaint of a violation. Rather, it was something that Mr. Lenci asked Mr. Henning

about, and Mr. Henning expressed himself as Mr.
4145 Lenci testified. But I don't believe that there was anything in the bulletins about it, nor was there any claim by Mr. Lenci that there was any violation of the license agreement or any of the bulletins.

Justice Stephens: There was one other reference to it, in the testimony, by this witness. So I thought there was some importance attached to it by Mr. Lenci.

Mr. Knuff: Maybe I can bring it out.

By Mr. Knuff:

Q. Mr. Lenci, you stated that you desired to make some exchanges on board or lath of particular sizes that your warehouse was out of, and that you had sent your truck over to Harrison to the United States Gypsum Company warehouse for those boards. And I infer from that that the USG did not give you the particular boards or the small quantity of boards that you wanted; is that correct? A. That is correct.

Q. And then you took that up with Mr. Henning at a later time, and Mr. Henning told you that on all exchanges of board, the exchanges should be based upon the minimum truckload; is that correct? If not, you straighten me out. A. They were not exchanges, they were proposed to be outright purchases by one licensee from another licensee, or from the licensor. In other words, if one particular
4146 licensee was out of a particular type of board at the moment, he could go to one of the other manufacturers and buy, as a favor, a small quantity to fill out the missing quantity.

Justice Stephens: That is what you meant by the use of the word "exchange"?

The Witness: I didn't know I used the word.

Justice Stephens: Yes, you did.

The Witness: I should not have used the word "exchange" in connection with that. It was purely a favor that we were asking to be granted.

By Mr. Knuff:

Q. It was an accommodation? A. Yes.

Q. You were short a particular type of board, and you wanted to buy enough board to make up that shortage? A. Yes.

Q. And that accommodation was at first refused you, and you took that up with Mr. Henning. And Mr. Henning said that in the future, all sales between manufactur-

ers should be based upon the minimum truckload; is that correct? A. That is correct.

Q. Was there a provision in the license bulletins with reference to that, if you know? A. I don't recall whether there was or not.

Mr. Knuff: I think when we adjourned on Friday,
4147 we had before us the question of Government's Exhibit 479, which is the meeting of December 13, 1932.

(Government's Exhibit 479 handed to witness.)

By Mr. Knuff:

Q. I believe we had just finished a discussion concerning USG soliciting a man in Providence by the name of Cartier. At that meeting in Chicago, on the 13th of December, 1932, was there a discussion concerning the trucking situation in Upstate New York, and if there was any such discussion will you tell us just exactly what the discussion was? A. As I recall it, at this time there was no provision for the licensees to truck into the areas surrounding the plants of the Paragon Plaster Company in Syracuse and the American Hardwall Plaster Company in Utica—

Q. (Interposing) Let me interpose one question. There was a provision, it is your understanding, that in the counties adjacent to the mills in Western New York, the license bulletins did permit trucking into certain counties adjacent to those mills; is that correct? A. They did so provide, yes.

Q. And you might consider that as the zone nearest the mill, and then there was a zone farther away from the mill in which trucking was not permitted; is that correct? A. That is correct.

4148 Q. Now go ahead with your answer. A. But it was the practice of both the Paragon Company and the American Hardwall to make truck deliveries throughout the territory adjacent to their mills, and we were anxious to be put in a position to compete with those two companies.

Q. You could only ship into that area by railroad? A. We could only ship into that area in carloads.

Q. And you wanted that area opened up so that truck shipments could be made into the counties in which Oakfield and Paragon, and so forth, were delivering by truck? A. Paragon and American Hardwall.

Q. And you took that up with Mr. Henning at the meeting? A. Yes.

Q. And what did Mr. Henning say about that? A. As I recall, he said he would give it consideration, and might make some arrangement for that.

Q. Were you the only person that brought that question up for discussion, or did other manufacturers also bring that up for discussion at that time? A. I don't recall. I know that I brought it up, but I don't remember whether anybody else advocated it or not.

Q. You don't recall whether there was any discussion or not? A. No.

4149 Q. Now at Linden, New Jersey, the Structural Gypsum Company had their mill, is that correct? A. Yes.

Q. And was there any discussion at the meeting on December 13, 1932, concerning the fact that Structural had a dealer at their mill, and if there was any such discussion what was it, please? A. Well, there was such a discussion, yes. You will recall that at that time the Kelley Plasterboard Company was selling the Structural Gypsum Board Corporation. We could not understand how, if Kelley was getting the correct price for his material from Structural they could make an arrangement to have a dealer located in their plant and put out material in competition with the licensees who were doing business directly without all this intermediate expense.

Q. When you say "they couldn't do that", whom do you mean, Structural or Kelley? A. Kelley.

Justice Stephens: What do you mean by "having a dealer located in their plant"?

The Witness: It was a complicated arrangement. Of course, we couldn't get the details of it. Here they have a manufacturing plant, and then they have in one end of it a dealer's yard set up—

4150 By Mr. Knuff:

Q. You are referring to Structural? A. I am referring to Structural.

Justice Stephens: Who was the dealer?

The Witness: He was a local dealer in the territory there, I forget what his name was. It put the rest of us at a disadvantage.

By Mr. Knuff:

Q. And the matter was referred to Mr. Kelley to straighten out; is that correct? A. Yes.

Q. Mr. Kelley was at that meeting, wasn't he? A. Yes.

Q. Did you ask Mr. Kelley whether or not they were selling at the regular bulletin price to Structural? A. I don't remember whether Mr. Henning asked that or not, but I do know that he told Kelley to investigate it and see that it was taken care of.

Q. Now at that meeting, Mr. Lenci, was the discount to manufacturing distributors discussed, that is, the amount of the discount to manufacturing distributors? A. Yes, it was.

Q. Who brought that up? A. Mr. Kelley.

Q. Now, at that time what was the discount to
4151 manufacturing distributors? A. At that time there was a discount of 15 percent on the wallboard, and 12-1/2 percent on the lath and plasterboard. And Mr. Kelley thought that that was too much of a discount to allow these other manufacturers, and wanted to reduce it to 10 percent.

Q. What, if anything, did the other manufacturers say about that? A. I don't think anybody made any comment on it, and Mr. Henning said that so far as he was concerned, he thought that the 15 percent and 12-1/2 percent were all right, and he would not make any change in the bulletins.

Q. Was there any question brought up at the meeting on December 13th concerning National having a warehouse with the Trygar Lumber Company? A. Yes, there was. I don't remember who brought that question up.

Q What was the discussion? A. The complaint was that the Trygar Lumber Company, at Perth Amboy, New Jersey, was renting warehouse space to the National Gypsum Company. I sort of put that backwards. The National Gypsum Company was renting space from the Trygar Lumber Company. That was a violation of the bulletins under the license agreement, which provided that no manufacturer should have these warehousing arrangements with
4152 dealers, which were in effect a price concession or rebate.

Q. And National reported that their previous arrangements with the Trygar Lumber Company no longer existed —is that the significance of that? A. Yes.

Q. Was there any discussion at that meeting concerning the Elhyde Lumber Company delivering as a jobber? A. That was a complaint made by the Atlantic, and I don't remember the details of that at the present time.

Q. Do you recall the attitude that the Certain-teed people took concerning that complaint, and by "Certain-teed people" I mean Mr. Henley, who represented Certain-teed at that meeting? A. The Certain-teed people denied the complaint, denied that this condition existed.

Q. Do you mean by that that Certain-teed denied that they were selling Elhyde as a jobber? A. That is correct.

Q. I notice our old friend Perry was up for discussion at this meeting on December 13—do you recall what that discussion was? A. I don't remember what that was.

Q. Did someone complain—let's see if I can refresh your recollection—did someone complain that Mr. Perry was still continuing to sell board as a jobber, and did Certain-
4153 teed say that they hadn't sold Perry since May 12?
A. Yes, but I don't remember the details.

Q. Was there any question about the Downs Lumber Company in Boston acting as a jobber? A. Yes, there must have been, because I made a memorandum of it; but that wasn't my complaint, and I don't remember it.

Q. You don't remember that? A. No.

Q. Was there any discussion at that meeting as to whether or not Certain-teed was renting space, warehouse space, in the Elhyde Lumber Company's yard? A. Yes, that goes back to the Elhyde complaint we mentioned just a few minutes ago. Certain-teed denied that they had any arrangement with Elhyde, but someone developed the information that Mr. Elhyde was president of what was called the Cambridge Terminal Warehouse, and that the arrangement was by Certain-teed with the Cambridge Terminal Warehouse.

Q. And what was the discussion concerning that? A. It was just a statement of fact, I believe.

Q. Do you know what position Mr. Henning took about that? A. No, I don't remember.

Q. You will recall, Mr. Lenci, at one of the pre-
4154 vious meetings at the Commodore Hotel in New York, that you were requested, or the manufacturers were requested to send the detail of the dunnage that they put in their cars. Do you recall that? A. Yes, I do.

Q. Now was the amount of dunnage, and the reports that these other manufacturers sent in, discussed at the meeting at Chicago on December 13? A. Yes. Mr. Henning said that the Board Survey had received the information asked for at the earlier meeting, and that the 8 companies had reported the average amount of dunnage each of them was using.

Q. The 8 companies had reported the average amount that each was using? A. Yes.

Q. Or the 8 companies reported the amount that each was using, which? A. In our own case, we reported the average amount we were using, and I believe each company did the same thing.

Q. And after Mr. Henning got that report, did Mr. Henning make any statement as to what they would consider a fair amount of dunnage to be put in each car? A. Well, he took the total of the 8 companies and from that reached an average of 610 square feet per car, which repre-
4155 sented an average figure of all the figures turned in; and he said that in view of that, and as most of the companies were using between 500 and 600 square feet, that that would be considered a fair amount of board, a proper amount of board to be used as dunnage to properly pack the car.

Q. Was there a general discussion by other manufacturers on this subject of dunnage at this meeting? A: There may have been some slight discussion, I don't think it was very much. There was some question, I know, as to American saying they only used 156 square feet per car, and we couldn't see how they could safely pack a car with such a small amount.

Q. American said that? A. No, the rest of us. At least, I will say that I could not understand how they could safely pack a car with only 156 square feet of dunnage.

Q. And you haven't any present recollection that there was any general discussion at that time? A. No.

Q. Did Mr. Henning say or indicate the size of the boards that would be considered proper to be put in a car for dunnage, that is, the width or the length, how the boards should be marked, and so forth? A. We were asked to use, as far as possible, narrow strips, that is, boards not
4156 over 12 inches wide, and these would be unusable on the job, and therefore could not be considered in any way as a gift or refund or rebate; and if it was necessary, especially with the wall board, which is the large board, to safely protect them, that whatever dunnage used wider than 12 inches would be stamped "dunnage" so it would be definitely identified as such.

Q. It was to be stamped in red letters 3 inches high with the words "Dunnage—not to be sold"? A. It didn't say "not to be sold", but as I recall it it was a big stamp marked "dunnage".

Q. I see. Did the other licensees agree to follow the suggestion of Mr. Henning as to this? A. I don't know that there was an agreement. I think he just said that that was what we would have to do.

Q. Did any person remonstrate as to that? A. No, we all felt that that was a good thing to do.

Q. You all felt it was a good thing to do? A. Yes, that the thing had been badly abused.

Q. On the third page, Mr. Lenci, of the memorandum that you have before you, on line 3, I just don't know what that means. Can you tell me?

That was simply a continuation of the explanation of the use of dunnage board. The first part that I have been talking about applies to the boxcars. Now, of course, all
4157 of us were doing trucking out of our various warehouses—

Justice Stephens: (Interposing) This won't mean anything in the record, because you have called the witness' attention to certain words in line 3, but they don't appear in the record.

Mr. Knuff: I will bring that out.

By Mr. Knuff:

Q. Are those initials "DA"—"DA trucks"—and what do they stand for?

Justice Stephens: I don't see that, Mr. Knuff.

Mr. Knuff: The third line on page 3. It looks to me like "DA trucks".

The Witness: No, it is "On—O-n"—"On trucks large board on bottom (if required) and nothing on top." The words "if required" are in parenthesis.

Mr. Knuff: Is that clear to the Court? It is clear to me.

Justice Stephens: Yes.

The Witness: That is a continuation of the dunnage matter, and it meant that on truckloads of wallboard, the big board, we could put a large damaged board for dunnage on the floor of the truck to protect the bottom board of the load.

Justice Stephens: You mean that was a statement by Mr. Henning as to what could be done?

4158 The Witness: Yes. The reason for that is that if you put a number of 12-inch strips on the bottom, and then put a good board on top of that, that good board would be immediately damaged by all these little pieces.

By Mr. Knuff:

Q. Now at that meeting, there was a long discussion as to who should pay the stop-over charges on stop-over shipments, was there not? A. Yes. That applied to the West and Southwest parts of the United States, and I was not interested in it because we did not make any shipments to the West and Southwest.

Q. Can you give me in detail a little more about that discussion? A. I do not remember it, because I was not interested and had no reason to remember it.

Q. Gypsum board manufacturers sell to at least two classes of dealers. One you might consider as mason supply dealers, and the other type of dealer that the manufacturers sell to is lumber yard dealers—is that correct? A. That is correct, yes.

Q. Now the terms in the lumber trade were what, Mr. Lenci? A. It goes way back into history, apparently. The local dealers, the lumber yards, were always able to buy from the lumber producers on very long discounts, 4159 long-term paper. In other words, they got a carload in, and a great many of them would pay in 60, 90, or 120 days. That had been a custom built up through the past years.

Q. In other words, the payment on a carload of lumber wouldn't be due, maybe, for 60 or 90 days? A. And sometimes longer than that.

Q. And sometimes 120 days? A. Yes. But on the other hand, materials such as gypsum products had gotten into a different group, such as cement and lime and products of that kind, which had always been paid for on a much more prompt basis.

Q. That is, on a 30-day basis? A. Usually on a 30-day basis, and a discount of 2 percent was allowed for cash payments in 10 days; or, in the case of larger purchases, 2 percent on the 10th of the following month. And we didn't want to have—you see, at this time this was in the low part of the depression—we didn't want to have all our money let out on these long terms if we could avoid it, and we wanted to hold the gypsum end of the business into the 2 percent 10-day group, or 30 days net, rather than have it drop into the lumber classification. We were asked by the licensor not to offer these long terms as an inducement in order to make sales.

Q. There was a discussion concerning the propriety or

adequacy of both classes of terms, was there not?
4160 A. I think the thing came about as a topic which Mr. Henning brought up and felt that that would be a good thing for us to do, and it was.

Q. And there was a discussion concerning it? A. There was a discussion, like I have just given it to you, more or less in the nature of an explanation. We all felt it was a good thing.

Q. And Mr. Henning said, then, that you were to stress payment within 30 days? A. Yes.

Q. Two percent cash in 10 days, and payment in 30 days? A. Yes.

You see, those had always been the gypsum terms, way back long before there was any wallboard or gypsum block or anything. It went back to the beginning of the gypsum industry.

Q. And were you to accept trade acceptances in payment for gypsum board? A. We were not to voluntarily offer to take notes, or offer to take trade acceptances, or offer to take bonds or other securities, in lieu of cash. But we were, of course, not prevented from accepting those in case a customer got in bad condition financially and we had to take whatever we could to secure the account. But they
4161 were not to be offered as an added inducement to make the sale.

Q. Now I notice—

Justice Stephens: Is that on the theory that that would be a kind of price concession?

The Witness: Yes. You see, this was in 1932.

By Mr. Knuff:

Q. That is when there was a depression? A. Yes.

Q. I notice that you have a note to the left of the margin, and I take it that that note means "notified Diegel"—I can't read the rest of it. A. It says, "Notified Hough, Diegel, Regan"—those were three of our men.

Q. That was something you put there to call something to your own attention; is that correct? A. Yes.

Q. In other words, you were to notify those three men as to the attitude that USG and the other licensees had concerning payment; is that correct? A. Yes, and that that was our policy.

Q. Was there any discussion at that meeting concerning the manufacturer being responsible for hired truckmen? A. Yes.

Q. Now I frankly don't know what I meant by the question "a manufacturer being responsible for hired
4162 truckmen", and I don't think it is a very intelligent question, but I didn't know what else to ask you in order to bring the discussion before the Court. What was that discussion? A. This applied in the territory where we were making truckload deliveries, and as you know, the license bulletins provided that we were to make truckload deliveries to the dealers' yards. In some cases we found that these dealers, when the truck got there, would give the driver a dollar or half a dollar or $2.00, and he would then go on from their yard and make a delivery to a job, which would be in violation of the license agreement. We were told by the licensor that if we had hired trucks, we would have to see that they abided by our regulations just as though they were our own trucks.

Q. Now, as I understand it, the deliveries were made not in your own trucks, but in hired trucks; is that correct? A. In our case, and in a good many of the other cases, they were in hired trucks.

Q. Now, what was wrong with a dealer re-hiring that truck to make the delivery to the job?

Mr. Bromley: May it please the Court, I am not always sure whether what the witness is answering he intends to indicate were things that happened at the meeting or
4163 didn't happen at the meeting. I have some difficulty in drawing the line. Can we have that made clear?

Justice Stephens: Yes, it should be made clear.

Was there any discussion on the subject of why that practice that you have just described, constituted a violation of the license agreements?

The Witness: Well, it was my understanding—

Justice Stephens: (Interposing) Was there any such discussion?

The Witness: Yes.

Justice Stephens: Tell what it was, then. Make clear in your own mind, Mr. Lenci, what you are being asked to tell us now; unless specific questions are asked on that topic, without objection, you are being asked not what your own opinion of these things is, but what Mr. Henning said and what discussions took place.

The Witness: Well, it first started with a complaint. One of the licensees—I don't remember which one it was—claimed that certain of the other licensees were permitting

practices by hired truckmen which were in violation of the license agreement.

Justice Stephens: You have explained that that alleged violation consisted of the hired truckmen being in effect re-hired by the dealer to go out to a particular job and deliver a part of the load.

4164 The Witness: Yes.

Justice Jackson: Did I understand you to say "re-hired", or "slipped a dollar or two"?

The Witness: They weren't re-hired. This was a bribe to the driver.

Justice Stephens: I said re-hired, in effect, by the dealer.

The Witness: Yes.

Justice Stephens: That is what you meant, wasn't it?

The Witness: Yes.

Justice Stephens: Was there any statement by Mr. Henning or others there, as to why that was in violation of the license agreement?

The Witness: Yes. He said that the license bulletins provided that we were to make delivery to the dealer and not to the job, and this bribe to the driver merely made us make a job delivery.

By Mr. Knuff:

Q. Mr. Henning construed the additional payment to the truckman as a bribe, is that correct? A. That is what it was, there is no question about it.

Q. There is no question about it at all? A. No.

Q. And he took the position at this meeting that the
4165 dealer couldn't re-hire the truckman to deliver those goods to the job; is that correct? A. Well, it was not a re-hiring—

Q. (Interposing) Just answer my question.

Justice Jackson: Say yes or no.

By Mr. Knuff:

Q. Did he take that position? A. No.

Q. He didn't take that position? A. Not that they couldn't re-hire the truck.

Q. He took the position that the giving of a dollar or $1.50 wasn't adequate compensation for the truckman to haul the goods from the dealer's warehouse to the job; is that correct? A. That is correct, yes.

Q. In other words, he objected to the amount more than to the practice, is that correct? A. Yes.

Q. What did he say would be a fair amount of money to give to these truckmen to take the goods from the warehouse to the job? A. I don't think he got into that; but on the face of it, a great many of these truckloads were 10 or 12-1/2 ton loads, and our average trucking price around New York would be $1.50 a ton, which would mean
4166 that that truckload represented a cartage charge of about $15 or $20. On the face of it, giving a man a half a dollar or a dollar was purely a bribe, and nothing else.

Justice Jackson: I suppose these were just truck drivers?

The Witness: Yes.

By Mr. Knuff:

Q. Mr. Henning took the position that that was a violation of the license bulletins; is that correct? A. Yes. In other words, it was just a bribe, and actually the manufacturer was making the job delivery.

Q. Now at that time, you actually hired these trucks to make the deliveries, or the manufacturers hired some of the trucks to make the deliveries; is that correct? A. We hired the trucks to make deliveries to the dealers' yards.

Q. And they were independent contractors? A. Yes.

Mr. Knuff: Would you like to take the morning recess at this time?

Justice Stephens: Yes, we will take our morning recess at this time.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

4167 Justice Stephens: Counsel for the Government has handed up to the bench this morning a copy of a notice to take depositions. Is that merely for the information of the Court? I don't know of any action the Court is required to take on it, under the rules.

Mr. Knuff: I had understood, your Honor, that the Court wanted four copies of everything that we filed with the Court. We always file the original with the clerk.

Justice Stephens: Yes, we are glad to have it. This is not the original, however, it isn't signed.

Mr. Knuff: That is a copy, the original has been filed with the clerk.

Justice Stephens: You are not asking for any action on it?

Mr. Knuff: Not at all.

Mr. Johnston: If the Court please, I assume they are proceeding under Rule 30. I should like to discuss the matter with counsel and the Court off the record, preferably in chambers, to see if we can come to some understanding.

I am satisfied that we will not be able to take Mr. Gloyd's deposition. I have here a report from his doctors, and since the matter came up the other day I arranged to have two other very eminent doctors examine him. I have letters addressed to your Honor.

Now I wouldn't like to have these get into the rec-
4168 ord, if there is any way of avoiding that, but I would like counsel to see them, and I would like the Court to see them, because there isn't any question but what Mr. Gloyd's condition is such that it would endanger his life to attempt to give a deposition or to appear on the witness stand.

Justice Stephens: We will be glad to take it up informally, although unless there is something actually before the Court I don't know that the Court has any authority.

Rule 26 provides:

"By leave of court after jurisdiction has been obtained over any defendant or over property which is the subject of the action or without such leave after an answer has been served, the testimony of any person, whether a party or not, may be taken at the instance of any party by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. Depositions shall be taken only in accordance with these rules."

That would seem to indicate that the matter is one between counsel unless there is some objection filed before the Court to the taking of the depositions on the ground of the physical incapacity of the proposed witness.

Mr. Johnston: Yes, we would move under Rule 30 (b),
but before I filed that motion, I wanted to have this
4169 informal discussion to see if we could avoid the necessity for it.

Justice Stephens: You may do that informally, during a recess if necessary. Perhaps you can show these letters to counsel and come to some informal agreement on the subject.

Mr. Johnston: Yes, your Honor.

Justice Stephens: Proceed with your examination.

By Mr. Knuff:

Q. Was there any discussion at the December meeting in Chicago, Mr. Lenci, concerning the position that the gypsum manufacturers should take with their salesmen regarding pool cars? A. Someone must have brought that up, but I have no present recollection as to what it was.

Q. 32"x 48" wallboard would be what is known as "cut stock" wallboard, would it not? A. Yes.

Q. And do you know whether it was the practice of dealers to sell this 32" x 48" cut stock as regular wallboard? A. I believe that was a matter that affected principally the Middle West at that particular time.

Q. And was there any discussion? A. (Interposing) I don't think there was any discussion. I think Mr. Henning made the statement that certain of the dealers in that area were buying boards which were 32" x 48", at the price for cut stock, and that they were selling it and calling it
4170 wallboard, which had the effect of reducing our sales of wallboard.

Q. And Mr. Henning called that to your attention, is that correct? A. He called it to the attention of someone, I don't know who it was. It was not us, we had no part in it.

Q. What was the discussion about that? A. I don't know that there was a discussion.

Q. It was just simply a statement that it was cutting into the sales? A. Yes.

Mr. Bromley: Did you intentionally skip the note about patent markings?

Mr. Knuff: I did, I intentionally skipped it.

By Mr. Knuff:

Q. Since Mr. Bromley has called it up, what was the discussion concerning patent markings? A. I think Mr. Henning said that his attention had been called by some of his salesmen to the fact that certain boards were coming through, plaster board I think at that particular time, with no identification on them.

Justice Jackson: No patent markings?

The Witness: No identification or patent markings.

By Mr. Knuff:

Q. Now coming back to the 32"x 48" cut stock, did
4171 Mr. Henning suggest that the manufacturers do anything to stop this practice of the dealers selling this as regular wallboard? A. No, I don't remember anything like that.

Q. On the last page of this exhibit, Mr. Lenci, concerning the December 13th meeting, there is a reference to sales tax. Was the question of sales tax discussed at the December 13th meeting? A. It must have been. As I recall it, that was one of the times when there was agitation for a national sales tax, and if such a tax had gone into effect, which of course it did not, that it should have been added to the price and not absorbed by the manufacturer.

Q. In other words, the representatives at that meeting were all agreed that in case sales tax legislation was enacted, that the manufacturer should not absorb the sales tax but should add that to the invoice for which the dealer should pay, is that correct? A. I don't remember just the details of that. I think the matter was brought up by the licensor just in case it did happen.

Q. And was it the licensor's position that the sales tax should be passed to the dealer rather than have the manufacturer absorb it? A. Yes.

4172 Q. And that sales tax applied not only to gypsum board, but it applied to plaster and all other gypsum products, is that correct? A. Yes.

Q. And that was discussed at the meeting? A. I don't know that it was discussed—

Q. (Interposing) But that was the position— A. (Interposing) That was the position of the licensor.

Justice Stephens: You said that the sales tax "applied" to gypsum products. There wasn't any sales tax, was there?

The Witness: It never did go into effect, but there was some agitation concerning it.

Justice Stephens: What you meant was that if there was a sales tax, and if it applied to all of these products, then it should be passed on to the dealer?

The Witness: Yes.

Mr. Bromley: Does he mean that there was discussion at the meeting as to things other than patented board?

The Witness: Well, I have a memorandum here, in parenthesis, which would indicate to me that that was my own interpretation added to that.

By Mr. Knuff:

Q. That is, your recollection now is that the sales tax, if enacted, would apply not only to the patented board, but that the sales tax should be passed on to the

4173 dealer on all other products that you were selling, is that your recollection? A. Well, it is my recol-

lection that that was my interpretation of what we would do on other products.

Mr. Knuff: We now offer in evidence Government's Exhibit 479.

Mr. Bromley: The same objection as heretofore made concerning this type of exhibit.

Justice Stephens: The objection is sustained on the ground that the exhibit is used to refresh a present recollection.

By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked Government's Exhibit 480 for identification, the same being a copy of a letter dated December 7, 1932, addressed to the United States Gypsum Company, and signed G. N. Lenci.

(The document referred to was marked as Government's Exhibit No. 480, for identification.)

By Mr. Knuff:

Q. Was the original of that letter sent to the United States Gypsum Company? A. Yes, it was.

Mr. Knuff: We now offer in evidence Government's Exhibit No. 480, your Honor.

Mr. Bromley: We make the usual objection.

Justice Stephens: Received in evidence, subject to the usual reservation with respect to declarations of al-
4174 leged co-conspirators.

(The document marked as Government's Exhibit No. 480 was received in evidence.)

Mr. Knuff: While we are on the subject of the Structural Gypsum Company, will you show the witness Governments Exhibits 443 and 445, please?

(Thereupon, Government's Exhibits Nos. 443 and 445 were handed to the witness.)

By Mr. Knuff:

Q. In the first paragraph of Government's Exhibit No. 445, you make reference in the last line of the first paragraph to "Gyp Steel"—do you notice that? A. Yes.

Q. By that you meant the Structural Gypsum Company, is that correct?

Justice Jackson: That is already clear in the record.

By Mr. Knuff:

Q. Now in the second paragraph, the second line, there is a reference to a Mr. Williams, do you notice that? A. Yes.

Q. Mr. Williams was connected with the Structural Gypsum Company, is that correct? A. That is correct, yes.

Q. I show you, Mr. Lenci, what has been marked
4175 for identification as Government's Exhibit No. 481, the same being a letter, dated December 19, 1932, addressed to Ebsary Gypsum Company and signed G. N. Lenci, Secretary.

(The document referred to was marked as Government's Exhibit No. 481, for identification.)

By Mr. Knuff:

Q. That letter was sent for the attention of Mr. E. H. Diegel, by you, was it not? A. Yes, sir.

Q. And that carries into effect the discussion that took place in Chicago on December 13, 1932, is that correct? A. Yes.

Mr. Knuff: We offer in evidence Government's Exhibit 481.

Mr. Bromley: We make the usual objection.

Justice Stephens: Received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 481 was received in evidence.)

By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked for identification as Government's Exhibit 482, the same being a copy of a letter, dated February 16, 1933, ad-
4176 dressed to the Board Survey Company and signed Ebsary Gypsum Company, G. N. Lenci, Secretary.

(The document referred to was marked as Government's Exhibit No. 482, for identification.)

By Mr. Knuff:

Q. Was the original of that letter sent to the Board Survey Company, Mr. Lenci? A. Yes.

Mr. Knuff: I offer in evidence Government's Exhibit No. 482.

Mr. Bromley: We make the usual objection.

Justice Stephens: Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 482 was received in evidence.)

By Mr. Knuff:

Q. I show you what has been marked for identification as Government's Exhibit 483, the same being a memorandum dated March 3, 1933, addressed to George N. Lenci, Secretary, and signed Ed. H. Diegel, Sales Manager.

(The document referred to was marked as Government's Exhibit No. 483, for identification.)

4177 By Mr. Knuff:

Q. Did you receive that memorandum, Mr. Lenci? A. Yes.

Q. I show you what has been marked for identification as Government's Exhibit No. 484, the same being a copy of a letter, dated March 24, 1933, addressed to the Board Survey Company and signed G. N. Lenci Secretary.

(The document referred to was marked as Government's Exhibit No. 484, for identification.)

By Mr. Knuff:

Q. I will ask you if the original of that letter was sent to the Board Survey Company. A. Yes.

Q. I show you what has been marked for identification as Government's Exhibit 485, the same being a letter, dated March 28, 1933, addressed to the Ebsary Gypsum Company and signed Board Survey Company, Frank M. Miller, Executive Secretary.

(The document referred to was marked as Government's Exhibit No. 485, for identification.)

By Mr. Knuff:

Q. Was that letter received at the Newark office
4178 of the Ebsary Gypsum Company? A. Yes.

Mr. Knuff: We now offer in evidence Government's Exhibits 483, 484 and 485.

Mr. Bromley: We make the usual objection.

Justice Stephens: All three exhibits are received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents marked as Government's Exhibits Nos. 483, 484 and 485 were received in evidence.)

Justice Stephens: Are you skipping the March 17th letter, the first of this series? We have a letter in this series which you handed to the Court, on the top of the series, addressed to John A. Kling. Are you skipping that?

Mr. Knuff: Yes, your Honor. Mr. Lenci has said that he didn't attend that meeting on March 10th, and I was going to use it for the purpose of refreshing his recollection if he had been there. But he said he didn't attend that meeting.

Justice Stephens: I see.

By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked for identification as Government's Exhibit No. 486, the same being a letter, dated April 13, 1933, addressed to the Board Survey Company and signed Ebsary Gypsum Company, George N. Lenci, Secretary.

4179 (The document referred to was marked as Government's Exhibit No. 486, for identification.)

By Mr. Knuff:

Q. Is that the original letter that was sent by you to the Board Survey Company? A. Yes.

Q. I also show you what has been marked for identification as Government's Exhibit 487, the same being a copy of a letter, dated April 17, 1933, addressed to the Ebsary Gypsum Company, and signed Board Survey Company—Executive Secretary.

(The document referred to was marked as Government's Exhibit No. 487, for identification.)

By Mr. Knuff:

Q. Did you receive the original of that letter, Mr. Lenci? A. Yes.

Mr. Knuff: I would like to have this letter marked for identification as Government's Exhibit 488. It is a copy of a letter, dated April 17, 1933, addressed to Mr.

Arthur R. Black, and signed Board Survey Company—Executive Secretary.

(The document referred to was marked as Government's Exhibit No. 488, for identification.)

Mr. Knuff: I would now like to offer in evidence
4180 Government's Exhibits 486 and 487. These two letters have been identified by Mr. Lenci as being—Exhibit 486, the original of the letter that he sent to the Board Survey Company; and 487— a copy of the letter that the Board Survey Company addressed to Mr. Lenci.

Government's Exhibit 488 was obtained from the files of the United States Gypsum Company—

Justice Jackson: (Interposing) You are not offering Exhibit 488?

Mr. Knuff: Yes, your Honor, I am going to offer that. Exhibit 488 is connected, by internal reference, to Exhibits 486 and 487.

I am now offering Government's Exhibits 486, 487 and 488.

Justice Stephens: Where did you say you obtained 488?

Mr. Knuff: Exhibit 488 was obtained from the files of either the United States Gypsum Company or the Board Survey Company, I am not quite sure which, at the present time, but it was furnished to us in response to subpoena.

Justice Stephens: Is it an original, or a copy?

Mr. Knuff: It is a carbon copy, your Honor. We do not have the original of the letter. It was not turned over to us by the American Gypsum Company.

Mr. Bromley: We make only the usual objection to Exhibits 486 and 487.

We make the usual objection to Exhibit 488 and
4181 also object to it as incompetent because there is no proper foundation. The Government had Mr. Black here and could have identified this letter when he was here, it seems to me.

Justice Stephens: Exhibits 486 and 487 are received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents marked as Government's Exhibits No. 486 and 487 were received in evidence.)

Justice Stephens: As Exhibit 488 is objected to as incompetent, that raises every objection under the topics of competency, including the best evidence rule. You have not yet accounted for the original or shown that this is

a true copy. The objection is not upon the ground of relevancy or materiality, except the usual objection, but it isn't shown by this witness to be a true copy of a letter from the Board Survey Company to Black, nor is the absence of the original accounted for.

Mr. Knuff: In that connection, we contend first that the letter is sufficiently identified because it relates to a subject-matter that was brought to the attention of the Board Survey Company by Mr. Lenci's letter of April 13, 1933, where he says:

"These people as you know were jobbers of American Gypsum Company board and were supposed to have
4182 been put on dealer's basis."

Then, on the 17th of April, 1933, the Board Survey Company wrote a letter to the Ebsary Gypsum Company acknowledging the receipt of the letter that I just referred to; and on the same day, that is on the 17th of April, the Board Survey Company wrote a letter to the American Gypsum Company on the same identical subject.

Now that letter of April 17, 1933, Government's Exhibit 488 for identification, was furnished to us by the Board Survey Company, or the United States Gypsum Company. The original of that letter, we of course subpoenaed from the American Gypsum Company. The American Gypsum Company did not turn it over to us.

As I say, the carbon came from the files of the Board Survey Company or USG, whichever furnished the letter to us. It was, to all intents and purposes, a document that they believed came within the terms of the subpoena. It came from their files.

It is connected both as to subject-matter and as to date, by internal reference, and I think that it is circumstantially identified. If we had the original we would give it to you. We don't have it.

Justice Stephens: The question isn't whether it is identified, as I understand it. It may be internally identified in the sense that it is shown to be connected with,
4183 and a probable part of, this correspondence. But the objection as to competency includes the objection that it is not the best evidence, and how can internal connection show that it is a true copy?

Mr. Knuff: We subpoenaed the best evidence; we haven't got it; they didn't turn it over to us.

Justice Stephens: I understand that, but the best evidence rule says that you must produce the best evidence

available, which in this case would be the original, and that if that is not available, you must prove that the secondary evidence is a copy of the original. What proof is there of that?

Mr. Knuff: The proof is that whenever USG turned it over to us we had a right to assume that this document is what it purports to be, a copy of the letter. They have said, "Here, Mr. Assistant Attorney General, is a copy of the letter that you have subpoenaed from us, we have had this in our files." And I think it would be safe to assume that the United States Gypsum Company, or Board Survey Company, must have tacitly said, "This is a copy."

Justice Stephens: Do you admit turning this over as a copy of the original letter from Board Survey to Black, Mr. Bromley?

Mr. Bromley: We only admit turning it over.

Justice Garrett: Did the subpoena which ran to
4184 these various companies for these papers specify particular papers or was it a blanket subpoena calling for everything?

Mr. Knuff: In certain instances it did specify particular things. In other instances, the subpoena was, of necessity, very broad.

Justice Garrett: You don't know, of course, as related to this particular item here, whether it was specified or whether it was included in the broad provisions of a subpoena?

Mr. Knuff: I would hazard a guess on it, your Honor, and say that we didn't say "Give us the original of the letter of April 17, 1933". I am quite sure we didn't do that. We subpoenaed all the letters relating to certain classes of transactions. We asked the various people to go through their files and give us what they considered were the documents that fitted those classifications.

This was turned over, as I say—and as Mr. Bromley has now admitted—by either USG or Board Survey, as meeting the description that was contained in our subpoenas duces tecum.

Justice Stephens: Well, I can imagine that if a subpoena was specifically drawn and served upon an opponent to produce either the original or an exact copy, if available, and the copy was produced, that that might be taken by the Court as proof to the Court of an admission that it was an exact copy.

But there is no showing to that effect here.

4185 Is the letter really of grave importance to your case?

Mr. Knuff: I am not going to argue any further on it—

Justice Stephens: (Interposing) We are bound to apply the rules of evidence when they are invoked, and there really isn't any evidence to the effect that this is a correct copy. The probabilities are that it is.

The objection is sustained to Exhibit 488.

You may, however, reoffer it, if you can call someone to prove that it is an exact copy of the original.

Mr. Knuff: We are not going to take the time of the Court to do that. I didn't think they would raise such a tempest in a teapot concerning this letter. I think you can see the difficulty that we probably would run into in trying to get any stipulations concerning letters.

Mr. Bromley: I still can't understand why counsel didn't ask Mr. Black about it when he had him here on the witness stand.

Justice Stephens: We cannot assume, Mr. Knuff, that the defendants do not have some good reason for urging an objection, and therefore we must rule according to the rules of evidence when an objection is made.

Mr. Knuff: Yes, your Honor.

By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked for identification as Government's Exhibit 489, the same

4186 being a letter dated March 31, 1933, addressed to the Ebsary Gypsum Company and signed Board Survey Company, Frank M. Miller, Executive Secretary.

(The document referred to was marked as Government's Exhibit No. 489, for identification.)

By Mr. Knuff:

Q. Was that letter received by the Ebsary Gypsum Company? A. Yes.

Q. I also show you, Mr. Lenci, what has been marked for identification as Government's Exhibit 490, the same being a letter, dated April 10, 1933, addressed to George N. Lenci, Secretary, and signed E. H. Diegel, Sales Manager.

(The document referred to was marked as Government's Exhibit No. 490, for identification.)

By Mr. Knuff:

Q. Did you receive that letter, Mr. Lenci? A. Yes.

Q. I show you what has been marked as Government's Exhibit No. 491 for identification, the same being a copy of a letter dated April 12, 1933, addressed to the Board Survey. Company and signed Ebsary Gypsum Company, Inc., G. N. Lenci, Secretary.

4187 (The document referred to was marked as Government's Exhibit No. 491, for identification.)

By Mr. Knuff:

Q. Did you send the original of that letter to the Board Survey Company? A. Yes.

Q. I show you what has been marked for identification as Government's Exhibit 492, the same being a letter, dated April 14, 1933, addressed to the Ebsary Gypsum Company and signed Board Survey Company, Frank M. Miller, Executive Secretary.

(The document referred to was marked as Government's Exhibit No. 492, for identification.)

By Mr. Knuff:

Q. Did you receive that letter, Mr. Lenci? A. Yes.

Q. I show you, Mr. Lenci, what has been marked for identification as Government's Exhibit No. 493, the same being the carbon copy of a letter dated April 20, 1933, addressed to the Board Survey Company and signed G. N. Lenci, Secretary.

(The document referred to was marked as Government's Exhibit No. 493, for identification.)

4188 By Mr. Knuff:

Q. Did you send the original of that letter to the Board Survey Company? A. Yes.

Mr. Knuff: I now offer in evidence Government's Exhibits 489, 490, 491, 492 and 493.

Mr. Bromley: We make the usual objection.

Justice Stephens: Received in evidence, subject to the usual reservation with respect to declaration of alleged co-conspirators.

(The documents marked as Government's Exhibits Nos. 489 to 493, inclusive, were received in evidence.)

Mr. Knuff: In Government's Exhibit 489, if your Honors please, I particularly call your Honors' attention to the second paragraph of that letter.

Justice Stephens: Yes, we have read that.

The Witness: May I ask if it is proper at this time to bring up a typographical error in Exhibit 493?

Justice Stephens: Yes, you may comment on that.

The Witness: You will notice in the center of the second paragraph the word "board" is ruled out after "plaster." The word "board" should have been eliminated from the word "plasterboard" in the next to the last line of the letter, also.

4189 By Mr. Knuff:

Q. Was the correction made on the original of the letter as it was sent out? A. I am not sure, but it should have been, because that is the question and that is the correct answer.

Q. In other words, in the next to the last line, the word "board" should be deleted from the word "plasterboard"? A. Yes.

Justice Stephens: What you mean is that when you wrote the letter you were intending to talk about plaster and not about plaster board.

The Witness: Yes, their question was—did we intend to give plaster away?

Justice Stephens: Very well. The exhibit itself cannot be altered, but your explanation of what you intended to discuss in the exhibit will appear of record.

Mr. Bromley: While we are on the subject, may I ask the witness if there is some mistake in the second paragraph of Exhibit 491?

The Witness: Yes, that is right.

Justice Stephens: What is the mistake there?

The Witness: The word "board" should not be there either.

Justice Stephens: Are you sure of that? I thought the charge here was that when you were selling board you were giving away plaster as a kind of rebate.

4190 The Witness: Well, the second paragraph should read:

"Whatever sales of plaster have been made to this firm have been made at the prevailing price and no special price made to induce board business."

Mr. Knuff: I don't believe, in Exhibit 491, your Honor, that that should be changed, because I think that the use of the word "plasterboard" there was the reason for the Board Survey letter of April 14, 1933, which is Exhibit 492.

The Board Survey Company, under date of April 14, 1933, Government's Exhibit 492, in the second paragraph say:

"We asked that you advise us as to whether or not you had donated to this firm plaster so as to reflect to it a rebate on its purchases of patented board from you". I think the reason for the second paragraph in Government's Exhibit 492 was occasioned by the use of the word "plasterboard" in Government's Exhibit 491.

Justice Stephens: The Court will have to refer it to the witness who wrote the letter.

The Witness: If there hadn't been this typographical error in the letter of April 12, 1933, there would have been no necessity for the letter of April 14.

Mr. Knuff: In other words, the letter of April 12 went out just as it is here, that is Exhibit 491?

The Witness: Yes.

Justice Stephens: I see what you mean. Proceed.

4191 By Mr. Knuff:

Q. I show you what has been marked for identification Government's Exhibit 494, the same being a letter, dated June 15, 1933, addressed to the Ebsary Gypsum Company, and signed Board Survey Company, Frank M. Miller, Executive Secretary.

(The document referred to was marked as Government's Exhibit No. 494, for identification.).

By Mr. Knuff:

Q. Will you state, Mr. Lenci, whether Government's Exhibit 494 was received at your Newark office? A. Yes.

Q. I show you what has been marked for identification, Mr. Lenci, as Government's Exhibit 495, the same being a letter, dated June 20, 1933, addressed to the Board Survey Company and signed Ebsary Gypsum Company, G. N. Lenci, Secretary.

(The document referred to was marked as Government's Exhibit No. 495, for identification.)

By Mr. Knuff:

Q. Is that the original letter that you sent to the Board Survey Company? A. Yes, it is.

Mr. Knuff: I would like to have marked for identification as Government's Exhibit 496, a memorandum dated
4192 June 13, 1933, addressed to Mr. F. M. Miller, and signed H. F. Sadler.

(The document referred to was marked as Government's Exhibit No. 496, for identification.)

Mr. Knuff: At this time I will now offer in evidence Government's Exhibits 494, 495 and 496.

Exhibit 496 was furnished to us under subpoena by the United States Gypsum Company or the Board Survey Company. It is dated June 13, 1933, which is two days previous to the date of Government's Exhibit 494, and it relates to the subject-matter contained in Government's Exhibits 494 and 495.

We contend that it is connected by internal reference with Government's Exhibits 494 and 495.

Justice Stephens: Who is H. F. Sadler?

Mr. Knuff: Assistant to one of the Vice Presidents of the United States Gypsum Company.

Justice Stephens: Is that correct?

Mr. Bromley: That is correct. He is here in the courtroom and we are showing it to him.

Mr. Knuff: At that time he was assistant to one of the Vice Presidents.

Mr. Bromley: We make only the usual objection to these exhibits.

Justice Stephens: Received in evidence, subject to the usual reservation with respect to declarations of al-
4193 leged co-conspirators.

(The document marked as Government's Exhibits Nos. 494, 495 and 496, were received in evidence.)

Mr. Knuff: In connection with Government's Exhibit 494, I call your Honor's attention specifically to the third paragraph of that exhibit, beginning—

Justice Stephens: (Interposing) We have read it.

Justice Garrett: I suppose in connection with that paragraph we should also read the third paragraph of the reply.

Mr. Knuff: Yes, your Honor, the third paragraph of the reply, Government's Exhibit 495. Thank you, Judge Garrett.

By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked for identification as Government's Exhibit 497, the same being a

carbon copy of a letter, dated June 15, 1933, addressed to the Ebsary Gypsum Company and signed Board Survey Company.

(The document referred to was marked as Government's Exhibit No. 497, for identification.)

By Mr. Knuff:

Q. I will ask if you received the original of that letter. A. I don't remember this one specifically.

Q. I show you what has been marked for identifi-
4194 cation as Government's Exhibit 498, the same being a letter, dated June 20, 1933, addressed to the Board Survey Company and signed by you.

(The document referred to was marked as Government's Exhibit No. 498, for identification.)

By Mr. Knuff:

Q. I will ask you if that is the original of the letter that you wrote to the Board Survey Company. A. Yes.

Q. Will you look at Government's Exhibit 497, in connection with Government's Exhibit 498, and I will ask you if Exhibit 498 is not a reply to the letter dated June 15, 1933, Government's Exhibit 497. A. That is correct.

Q. So that you would now say that you did receive the original of the letter dated June 15, 1933? A. That is right.

Mr. Knuff: I would like at this time to have marked for identification as Government's Exhibit 499, a memorandum dated June 13, 1933, addressed to Mr. F. M. Miller, and signed H. F. Sadler, Assistant to the Vice President.

(The document referred to was marked as Government's Exhibit No. 499, for identification.)

4195 Mr. Knuff: At this time I offer in evidence Government's Exhibits 497, 498 and 499. Government's Exhibit 499 is in the same category with, and what I have said concerning Government's Exhibit 496, equally applies to Government's Exhibit 499.

Mr. Bromley: We make the usual objection.

Justice Stephens: Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents marked as Government's Exhibits Nos. 497, 498 and 499 were received in evidence.)

Mr. Knuff: In Government's Exhibit 497 I call your Hon ors' attention specifically to paragraph 3 of that exhibit; and in Government's Exhibit 498, I call your Honors' attention to the last paragraph of that exhibit.

I should have—but through inadvertence I overlooked—called your Honors' attention to the last paragraph of Exhibit 499.

Justice Stephens: Very well.

Mr. Knuff: Mr. Bromley has called my attention to the fact that it is twelve-fifteen, and I wonder if you would care to adjourn at this time.

Justice Stephens: Yes, we will adjourn at this time until 1:45.

(Thereupon, at 12:15 o'clock p. m., a recess was taken until 1:45 o'clock p. m. of the same day.)

4196 AFTERNOON SESSION

(The trial was resumed at 1:45 o'clock p. m., pursuant to recess.)

Justice Stephens: You may proceed.

Thereupon, GEORGE N. LENCI the witness on the stand at the time of recess, resumed the stand and testified further as follows:

Direct Examination (resumed)

By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked for Identification as Government's Exhibit 500, the same being a letter dated April 24, 1934, addressed to George N. Lenci, and signed H. F. Sadler.

(The document referred to was marked Government's Exhibit No. 500 for Identification.)

By Mr. Knuff:

Q. Will you tell us, Mr. Lenci, whether or not that letter was received at your Newark office? A. Yes.

Q. I show you what has been marked for Identification as Government's Exhibit 501, the same being a letter dated May 3, 1934, addressed to the Board Survey Company and signed George N. Lenci.

4197 (The document referred to was marked as Government's Exhibit No. 501 for Identification.)

By Mr. Knuff:

Q. I will ask you if that is a reply to the letter identified as Government's Exhibit 500, if that is your reply? A. Yes.

Mr. Knuff: I offer in evidence Government's Exhibits 500 and 501.

Mr. Bromley: We make the usual objection.

Justice Stephens: Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents referred to, marked as Government's Exhibits 500 and 501, were received in evidence.)

Q. I show you what have been marked for Identification as Government's Exhibits 502 and 502-A, Exhibit 502 being a telegram dated November 8, 1934, addressed to Mr. C. F. Henning and signed by the Ebsary Gypsum Company; and Exhibit 502-A being a pencilled notation attached to Government's Exhibit 502.

4198 (The documents referred to were marked Government's Exhibits 502 and 502-A for Identification.)

By Mr. Knuff:

Q. Will you state, Mr. Lenci, whether or not Government's Exhibit 502 is a telegram that was sent to Mr. Henning, and will you explain what Government's Exhibit 502-A is? A. Exhibit 502-A is a memorandum which was given to me by, I believe, Mr. Diegel—I think that is his writing—and serves as a basis for the complaint which we make in our telegram dated November 8, 1934, to the United States Gypsum Company.

Q. In other words, Exhibit 502-A is the memorandum that occasioned the telegram which was sent to Mr. C. F. Henning, which has been marked for Identification as Government's Exhibit 502; is that correct? A. That is right.

Mr. Knuff: We offer in evidence Government's Exhibits 502 and 502-A.

Mr. Bromley: We make the usual objection.

Justice Stephens: Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents referred to, marked as Government's Exhibits 502 and 502-A, were received in evi-
4199 dence.)

Mr. Knuff: If your Honors please, the next three photostats—one being dated March 10, 1933 addressed to Mr. C. F. Henning; another dated March 11, 1933, to Mr. Lenci; and the third being dated March 14, 1933—while we believe they are material and probably are admissible, yet we do not feel that we are going to offer them in evidence, so I will ask the Court to just omit the next three exhibits and we will come to the exhibit which is dated April 22, 1932.

Justice Garrett: And numbered?

Mr. Knuff: It will be marked as Government's Exhibit 503 for Identification.

(The document referred to was marked as Government's Exhibit No. 503 for Identification.)

Mr. Knuff: Mr. Finck, will you stipulate for the record, please, that Government's Exhibit 503, being a letter dated April 22, 1932, addressed to Mr. M. H. Baker, National Gypsum Company, was received by National Gypsum Company?

Mr. Finck: No, I couldn't do that.

Mr. Knuff: Did you not furnish the exhibit marked 503 for Identification to us by virtue of a subpoena?

Mr. Finck: This came from our files.

Justice Stephens: Is that the original?

4200 Mr. Finck: It apparently is an original letter signed by Frank M. Miller. I believe that that is the number that we put on there, but I know nothing else about it. I don't know who received it or anything about it.

Mr. Knuff: Will you stipulate that it came from your files?

Mr. Finck: Yes.

Mr. Knuff: Will you stipulate, Mr. Bromley, that the signature of Frank M. Miller is Mr. Miller's signature?

Mr. Bromley: Why don't you ask the witness about it?

Mr. Knuff: This letter wasn't addressed to this witness. It was a letter addressed to Mr. Baker.

I have no objection. I thought we could save a few minutes by getting a stipulation on the record.

Will you show the witness Government's Exhibit 503 for Identification, please?

(Government's Exhibit 503 handed to witness.)

Justice Stephens: Is that 503 the witness has?

Mr. Knuff: Yes.

Justice Stephens: I thought the one you handed Mr. Finck was the original.

Mr. Knuff: I didn't hand any to Mr. Finck. Someone at the counsel table did so.

Justice Stephens: I see.

By Mr. Knuff:

4201 Q. Is that the signature of Mr. Frank M. Miller?

A. This is the first time I have been asked to identify Mr. Miller's signature. Heretofore all the letters have been submitted to Mr. Bromley.

Q. That is right. You have received communications from Mr. Miller, have you not? A. Yes.

Q. Would you say that that is his signature? A. I think it is the same as the others, but I never saw him write it, so I don't know.

Mr. Knuff: We again ask Mr. Bromley if he will stipulate that that is Mr. Miller's signature?

Mr. Bromley: Yes.

Mr. Knuff: We now offer in evidence Government's Exhibit 503.

Justice Stephens: Is there any objection?

Mr. Bromley: We make the usual objection.

Justice Stephens: Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 503, was received in evidence.)

Mr. Knuff: In connection with this exhibit, if Your Honors please, I call Your Honor's attention to Govern-
4202 ment's Exhibit No. 38, page 122, the third paragraph from the bottom, reading:

"The establishment or continuahce of warehouses, consigning of stocks," and so forth.

In the same exhibit, that is, Government's Exhibit 38, I also call attention to page 119, the fourth paragraph from the bottom, beginning: "The establishment or continuance of warehouses", and so forth.

Justice Stephens: We have looked at those now. Have you something to urge or offer concerning them?

Mr. Knuff: I want to call your Honors' attention to the last paragraph in Government's Exhibit 503 in connection with Government's Exhibit 38, page 122, the third para-

graph from the bottom, and Government's Exhibit 38, page 119, the fourth paragraph from the bottom, and Government's Exhibit 38, page 117, the fourth paragraph from the bottom. Those are license bulletins referred to in the last paragraph of this letter:—the one of April 12, 1932, the one of April 14, 1932, and the one of April 16, 1932.

Justice Stephens: What do you want us to do about it?

Mr. Knuff: I am making a cross-reference.

Justice Stephens: For the purpose of the record to show the relationship of the exhibits?

Mr. Knuff: Yes, for the purpose of the record, I am making a cross-reference at this time so that if Your
4203 Honors care to look up the reference in that paragraph of Exhibit 503, you will have a ready cross-reference for it.

Justice Stephens: Thank you very much.

By Mr. Knuff:

Q. I show you, Mr. Lenci, Government's Exhibit 504 for identification, the same being a letter dated March 30, 1933, addressed to George N. Lenci, Secretary, and signed George F. Neal.

(The document referred to was marked as Government's Exhibit No. 504 for Identification.)

By Mr. Knuff:

Q. Was that letter received by you, Mr. Lenci? A. Yes.

Q. I show you what has been marked for Identification as Government's Exhibit 505, the same being a letter dated April 12, 1933, addressed to the United States Gypsum Company and signed Ebsary Gypsum Company, F. G. Ebsary, President.

(The document referred to was marked as Government's Exhibit No. 505 for Identification.)

By Mr. Knuff:

Q. Is that a copy of a letter that was sent to the United States Gypsum Company, Mr. Lenci? A. Yes.

4204 Justice Stephens: Before you proceed, who was the Mr. Neal referred to in the previous letter?

The Witness: Neal was our New York State salesman.

By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked for Identification as Government's Exhibit 506, the same being

a letter dated April 17, 1933, addressed to the Ebsary Gypsum Company and signed Board Survey Company, Frank M. Miller, Secretary.

(The document referred to was marked as Government's Exhibit No. 506 for Identification.)

By Mr. Knuff:

Q. Was that letter received in your Newark office? A. Yes.

Mr. Knuff: I now offer in evidence Government's Exhibits 504, 505, and 506.

Mr. Bromley: We make the usual objection.

Justice Stephens: Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents referred to, marked as Government's Exhibits 504, 505, and 506, were received in evidence.)

4205 By Mr. Knuff:

Q. Mr. Lenci, did you attend a meeting of the licensees in the Hotel Commodore on April 17, 1933? A. I don't recall. April 17?

Q. Either April 17 or April 27, 1933. A. I don't remember.

Q. I show you what has been marked for identification as Government's Exhibit 507, and I will ask if that memorandum refreshes your recollection concerning a meeting held in April, 1933, in the Hotel Commodore? A. Yes. The date is April 27.

(The document referred to was marked as Government's Exhibit No. 507 for Identification.)

By Mr. Knuff:

Q. The date of the meeting was April 27, 1933? A. Yes.

Justice Jackson: Where do you get that?

The Witness: Up near the top, the third line from the top.

Justice Jackson: I see it, thank you.

By Mr. Knuff:

Q. Who attended that meeting, Mr. Lenci? A. Well, the United States Gypsum Company was represented by Mr. Henning and Mr. Gallagher.

4206 Q. And who is Mr. Gallagher? A. Mr. Gallagher—I don't know his exact title, but he was what corresponded to the Eastern Sales Manager.

Q. Of USG? A. Yes.

Q. Was National represented? A. Yes, by Mr. Baker and Mr. Burley.

Q. And what position did Mr. Burley have with National? A. Vice President in Charge of Sales.

Q. Was Atlantic represented? A. Yes, by Mr. Fuller and Mr. Neale.

Q. Was Certain-teed represented? A. Yes, by Mr. Brown and Mr. McCausland and Mr. Roos.

Q. Was it C. O. Brown or George M. Brown, if you can recall? A. I am quite sure it was C. O.

Q. And Mr. Roos was Edwin G. Roos, is that correct? A. Yes.

Q. And was Universal represented at this meeting? A. Universal was represented by Mr. Holland.

Q. And was Kelley Plasterboard Company represented there? A. Yes, by Mr. Kelley. And the Ebsary Gypsum Company was represented by Mr. Diegel and myself.

4207 Q. Neither American nor Texas were represented at that meeting, is that correct? A. No, they were not.

Q. Was there any discussion at that meeting concerning plywood? A. Yes.

Q. What was the discussion? A. Well, first of all, to explain what plywood is,—which might make it a little simpler,—plywood is a lumber product, made of thin laminated sheets of lumber which are put together under pressure and make a wood sheet which is known in the trade as plywood. At that time they were selling a great deal of plywood in competition with gypsum board. It was used generally for the same purposes.

Mr. Henning made the statement that if they continued to encroach on the gypsum business, he might have to make some change in our prices,—in other words, lower our prices in order to meet this anticipated competition from an outside product.

Q. What did the licensees say about that? A. I don't know that we said anything about it. We naturally hoped that it wouldn't happen.

Justice Stephens: What do you mean by "they continued to encroach"?

The Witness: The plywood manufacturers.

4208 Justice Stephens: I see.

By Mr. Knuff:

Q. Was there any discussion at that meeting concerning the Quaker City Supply Company? A. Yes, there was. Someone made a complaint—I don't know just which company it was. The Quaker City Supply Company was a customer of the Kelley Plasterboard Company, in Philadelphia. Whoever made the complaint made it on the basis that Kelley was selling Quaker City, who are dealers, at less than the dealer price.

Q. Well, was the complaint made that Kelley was selling them at a low price, or was the complaint that Quaker City was selling at a low price? A. Well, maybe I took a little short-cut on that. The Quaker City were putting out prices which showed that they must be buying at a low price from Kelley in order to quote the prices which they did.

Q. That is, someone made a complaint and referred to the low prices at which Quaker City was selling that board? A. That is right.

Q. And from that, that person inferred that Kelley must be selling Quaker City at a low price? A. At less than the dealer price.

Q. Was the matter referred to anyone for in-

4209 vestigation, if you know, Mr. Lenci? A. I don't recall.

Q. Was there any discussion at that meeting concerning the Watertown— A. (Interposing) That would be the Watertown Builders Supply Company.

Q. Was there any discussion concerning them at that meeting? A. Well, their name was brought up, but at the present moment I don't remember what that was.

Q. Was that in connection with the low price at which they were selling material? A. Yes, but I don't remember the details.

Q. You don't remember the details? A. No, I don't.

Q. You recall, however, that it was in connection with some low price that the Watertown Company was using? A. Yes.

Q. Was there any discussion concerning the Atlas Builders Supply Company of Brooklyn? A. There must have been, but at the present moment I don't recall what it was.

Q. You don't recall? A. No.

Q. Was our old friend Perry again discussed at
4210 this meeting? A. There is a memorandum that Perry was not jobbing, but I don't know whether it was the company that was selling Perry said he was not, or whether the consensus of opinion was that he really had stopped—I don't know.

Q. All you can recall at this time is— A. (Interposing) That his name was brought up.

Q. Before the licensees, is that correct? A. Yes.

Q. Was Colonel Lawton's name brought up also, at that meeting? A. Yes, and my answer would be the same as to Colonel Lawton as with regard to Perry.

Q. Was there any discussion concerning the Oakfield Gypsum Company at the meeting on April 27, 1933? A. Yes, we complained about them.

Q. What was the nature of your complaint? A. Well, our complaint was that we could see no reason why these various subsidiaries of the Oakfield Gypsum Company should be sold when they, in actual practice, were dealers, or very close to it. We felt that the Oakfield Gypsum Products Company was the company which should be sold, and that the material should be shipped to them at Oakfield.

Q. That is, you complained that the American Hardwall Plaster Company, the Paragon Plaster Company,
4211 and the Paragon Plaster & Supply Company—that any orders for board that they might place should not be delivered from your mill, but should only be delivered to Oakfield; is that correct? A. Yes, our claim was that these three companies were using their ownership of the Oakfield Gypsum Company merely as a subterfuge to get material for themselves at their destinations at a manufacturing distributor's discount when, as a matter of fact, the largest part of their business was as dealers.

Q. And the position that you took was that board should only be delivered by Ebsary to Oakfield; is that correct? A. That is correct.

Q. And that it should not be shipped from the Ebsary plant for the account of Paragon, or Paragon Plaster & Supply, or American Hardwall? A. Yes, that was our argument.

Q. What disposition was made of that complaint at that time? A. I think Mr. Henning said that he was going to consider it, and would make that change.

Q. And would make the change? A. Yes.

Q. Do you know whether the change was ever made? A. I don't think it was.

4212 Q. You don't? A. I don't think it ever was.

Q. Now, if you were selling the Connecticut Adamant Plaster Company at a manufacturer's discount, and the Connecticut Adamant Plaster Company told you to ship to some dealer in Lower New York State, would you have made the shipment to the dealer direct, or would you have sent it up to Connecticut? A. First of all, we had no orders of that kind from the Connecticut Adamant Plaster Company. Our experience with the Connecticut Adamant was entirely different from what it was with the Oakfield Gypsum Company. Any sales that were made to the Connecticut Adamant Company, they did all of their business with dealers; whereas, sales to the subsidiaries of the Oakfield Gypsum Company, these subsidiaries were really dealers. Do you get the difference that I am trying to explain there?

Q. I am afraid I don't. I wonder if you can make it any clearer? A. In the case of the Connecticut Adamant Company, sales to them were made on the basis that they were manufacturing distributors and their sales were not to the consumer but to a dealer; but when we sold the various subsidiary companies of the Oakfield Gypsum Company, their sales were direct to the consumer. In other

4213 words, they were using the manufacturers discount to give them an unfair advantage over corresponding dealers in the same territory.

Justice Stephens: They were really dealers, in other words?

The Witness: They actually were dealers. In each of these places they maintained warehouses and distributing plants, and bought as manufacturers, but sold as dealers, which we felt gave them an unfair advantage.

By Mr. Knuff:

Q. Well, now, the board that was ordered by the Paragon companies was all placed for the account of Oakfield, was it not? A. Not always, no.

Q. Well, on board that was placed for the account of Oakfield, what was your position on that? A. You must understand that I don't know, because we did not sell any of these companies at that time. So I can't tell exactly

who placed the orders, whether they were placed by Oakfield or placed by their branches.

Justice Stephens: Just a minute. In order that this record may be clear and have continuity, unless the Court misunderstood you, there is a conflict in your statement. As I understood you to say not long ago, you said you thought Ebsary ought not sell these three alleged subsidiaries of Oakfield because it would give them an
4214 unfair advantage. You have just stated now that you didn't sell them at all.

The Witness: We made the complaint that others were selling them on that basis, which we thought was not correct.

Justice Garrett: Let me interpose for a moment. I had obtained the impression from past testimony that Paragon and American Hardwall and the other one, were not the subsidiaries of Oakfield but the parents of Oakfield—which is right?

The Witness: I can't answer that exactly. Theoretically, that is, it has been stated from time to time that those three companies were the owners of the Oakfield Gypsum Company, but I don't know.

Justice Garrett: I don't believe it is in your testimony, but it is in the testimony of other witnesses here that Paragon and American Hardwall and Paragon Plaster & Supply Company were the parents of Oakfield.

Mr. Knuff: It has been my understanding, Judge Garrett—and I don't know whether there is any dispute about it or not—that those three companies, the two Paragon companies and the American Hardwall, were the owners of the Oakfield Gypsum Products Company. In other words, Oakfield and the two Paragon companies and the American Hardwall Plaster were at least affiliated interests.

Now as I say, I understand that the parent companies were the two Paragons and the American Hardwall Plaster.

Justice Garrett: That would be the impression I
4215 had obtained from past testimony.

Mr. Knuff: That is my understanding.

Justice Garrett: But now there is some intimation—and I don't want to get confused about it—that Oakfield was the parent company of those other three companies. I think we ought to have that cleared up. I don't see any reason why it shouldn't be cleared up. I don't believe

the complaint charges the relationship. I looked through it the other day to find if it does.

Mr. Knuff: It doesn't.

I would be willing to stipulate that the three companies, that is, the American Hardwall Plaster Company, the Paragon Plaster Supply Company of Scranton, and the Paragon Plaster Company of Syracuse, were the owners of the Oakfield Gypsum Products Company.

Justice Jackson: Owners of the stock of the Oakfield Gypsum Products Company?

Mr. Knuff: Yes. I don't know whether my brothers on the other side would so stipulate or not.

Mr. Bromley: That is my understanding, except that I don't know how much stock in Oakfield each one of the three owned, nor do I know that the three together owned all the stock. But my understanding is that the three together owned either all or a substantial part of the stock of Oakfield.

Mr. Knuff: That was my understanding.

4216 Justice Garrett: I think that is sufficient for the time being, at least.

By Mr. Knuff:

Q. Your complaint was that the Paragon companies and the American Hardwall—

Justice Jackson: (Interposing) I think that is just as clear as crystal, the witness' testimony so far.

Mr. Knuff: I think that is correct. I am just falling into that bad habit that I have, Judge Jackson. I am unconsciously falling into it.

Justice Jackson: I know it is clear to me, and I assume it is to everybody up here.

By Mr. Knuff:

Q. Was there any statement made at that meeting concerning perforated lath being used on the West Coast? A. Yes, I believe there was.

Q. What was the statement, and who made it? A. As I recall it, Mr. Henning—you see, up to this time we, I believe, had not had any experience with perforated lath—

Justice Jackson: (Interposing) You mean Ebsary, do you, when you say "we"?

The Witness: Yes.

Mr. Henning was explaining that on the Pacific Coast they had been using perforated lath for some time,
4217 and that it had worked out very successfully there through one or two of the earthquakes.

By Mr. Knuff:

Q. Through one or two of the what? A. Earthquakes.

Q. That was back when? You don't mean the San Francisco Earthquake?

Justice Jackson: Oh, they are having earthquakes out there all the time.

Q. It didn't go back as far as the 1908 quake? A. No; but as I recall it, it was around the Southern California district, either in the late 20's or the early 30's. And they found out that the perforated lath held the plaster on the ceilings much better than the plain lath, and they thought that it might be a good thing to introduce it in the East.

Q. And what was the reaction, if there was any reaction? A. I think that was merely a statement that they were going to investigate it further.

Q. Do you recall if Mr. Henning said how long perforated lath had been in use on the West Coast? A. No, I don't know that he said that, but I do know from personal experience—

Justice Stephens: (Interposing) Just state what
4218 he said. That is what you are being asked about now.

The Witness: No, I do not.

By Mr. Knuff:

Q. Do you recall whether Mr. Henning said that the perforated lath had better fire-resisting qualities than the straight lath? A. I don't remember that he mentioned that, at this time.

Mr. Knuff: We offer in evidence Government's Exhibit No. 507.

Mr. Bromley: I object to it on the grounds heretofore stated with respect to other similar exhibits.

Justice Stephens: The objection is sustained on the ground that the exhibit is used to refresh a present recollection.

By Mr. Knuff:

Q. I show you what has been marked for Identification as Government's Exhibit 508, the same being a letter dated

May 8, 1933, addressed to the Ebsary Gypsum Company and signed Frank M. Miller.

(The document referred to was marked as Government's Exhibit No. 508 for Identification.)

By Mr. Knuff:

Q. Will you state whether or not that letter was received, Mr. Lenci? A. Yes.

4219 Q. I show you what has been marked for Identification as Government's Exhibit 509, the same being a letter dated May 17, 1933, addressed to George N. Lenci and signed George F. Neal.

(The document referred to was marked as Government's Exhibit No. 509 for Identification.)

By Mr. Knuff:

Q. Was that letter received in your Newark office, Mr. Lenci? A. Yes.

Q. I show you what has been marked for Identification as Government's Exhibit 510, the same being a copy of a letter dated May 22, 1933, addressed to the Board Survey Company, Chicago, Illinois, and signed George N. Lenci.

(The document referred to was marked as Government's Exhibit No. 510 for Identification.)

By Mr. Knuff:

Q. Will you state whether that is a copy of a letter the original of which was sent to the Board Survey Company, Mr. Lenci? A. Yes.

Q. I show you what has been marked for Identification as Government's Exhibit 511, the same being a copy
4220 of a letter dated June 1, 1933, addressed to the Board Survey Company and signed G. N. Lenci.

(The document referred to was marked as Government's Exhibit No. 511 for Identification.)

By Mr. Knuff:

Q. Is that a copy of a letter the original of which was sent to the Board Survey Company? A. Yes.

Mr. Knuff: I offer in evidence Government's Exhibits 508, 509, 510, and 511.

Mr. Bromley: We make the usual objection.

Justice Stephens: Received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents referred to, marked Government's Exhibits 508, 509, 510 and 511, were received in evidence.)

Mr. Knuff: The next 16 pages in your book of photostats we will omit.

Justice Jackson: Does that bring us to the telegram?

Mr. Knuff: Yes, Your Honor.

Mr. Bromley: Do you mean 16 pages or 16 exhibits?

Mr. Knuff: I mean 16 pages. Some of the ex-
4221 hibits would be more than one page.

That brings us down to the telegram of June 3, 1935. Then beginning with that telegram of June 3, 1935, omit the next 8 pages, which will bring us to the letter dated March 28, 1936.

(Discussion off the record.)

Justice Jackson: The letter of March 28th will then be Exhibit 512?

Mr. Knuff: Yes.

By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked for Identification as Government's Exhibit 512, the same being a letter dated March 28, 1936, addressed to C. F. Henning, Vice President, and signed George N. Lenci.

(The document referred to was marked as Government's Exhibit No. 512 for Identification.)

By Mr. Knuff:

Q. Will you state whether that is a letter that you signed? A. Yes.

Q. I show you, Mr. Lenci, what has been marked for Identification as Government's Exhibit 513, the same being a letter dated May 9, 1936, addressed to the Ebsary Gypsum Company and signed Charles M. Price.

4222 (The document referred to was marked as Government's Exhibit No. 513 for Identification.)

By Mr. Knuff:

Q. Was that letter received by your company? A. I think it must have been, although I have no separate recollection of it.

Q. I show you what has been marked for Identification as Government's Exhibit 514, the same being dated April 1, 1936, signed Kelley Plasterboard Company, Inc., by S. J. Kelley, President. It is on a complaint form.

(The document referred to was marked as Government's Exhibit No. 514 for Identification.)

By Mr. Knuff:

Q. Was that complaint form enclosed in the letter of May 9, 1936, Mr. Lenci? A. Yes, I believe it was.

Mr. Knuff: I would like to have marked for Identification as Government's Exhibit 515, the original document, of which, as Your Honors can perceive, Government's Exhibit 514 is a copy. Exhibit 515 was obtained by the Government under subpoena from either the United States Gypsum Company or the Board Survey Company.

(The document referred to was marked as Government's Exhibit No. 515 for Identification.)

4223

Mr. Knuff: I now offer in evidence Government's Exhibits 512, 513, 514, and 515.

Justice Stephens: Where is the letter of April 1st to which Exhibit 513 refers?

Mr. Knuff: There isn't any letter of April 1st that we have been able to locate, and I think I can clear that up by this witness here.

By Mr. Knuff:

Q. You will notice in Exhibit 513, Mr. Lenci, that Mr. Price refers to your letter of April 1st. Do you notice that? A. Yes.

Q. Do you have any recollection of writing to the Board Survey Company under date of April 1st? A. No, my letter is dated March 28.

Q. Can you offer any explanation as to the reference to April 1st in Mr. Price's letter? A. No.

Mr. Knuff: If Your Honors will please notice, it was apparently a mistake in Mr. Price's letter, and the complaint is dated April 1st, 1936, and that is Government's Exhibit 514. Apparently that is what Mr. Price referred to as a letter. The letter of Mr. Lenci that should

4224 have been referred to was dated March 28, 1936.

Justice Stephens: Is there any objection, except the usual objection, to these exhibits?

Mr. Bromley: I don't understand—may I have the last statement of counsel read?

(The record was read by the reporter.)

Mr. Knuff: You can call the paper of April 1, 1936, either a complaint or a licensee's explanation—I don't mean to place any wrong catalog on that document.

Justice Stephens: Where is this letter of March 28?

Mr. Knuff: That is Government's Exhibit 512, Your Honor.

Mr. Bromley: To these four exhibits we make the usual objection; and in addition, it seems to me that this is another illustration of a completely erroneous impression created by the omission of a vital step in this correspondence. Exhibit 513 makes reference to a letter of April 1. Now we know from the criminal case that the letter of April 1 was the complaint of the Ebsary Company against the Kelley Company, to which complaint Exhibit 514 is an answer. Exhibit 514 has been referred to here by counsel as a complaint form. It isn't. It is a licensee's explanation form. Exhibit 514, the original of which is Exhibit 515, are both Mr. Kelley's answer to the complaint which Ebsary made against him on April 1, 1936.

4225 Justice Jackson: How can it be dated the same date? They are dated April 1, these so-called complaint forms.

Mr. Bromley: You see, the date of the explanation is not April 1, but May 1. It is dated April 1 at the top. I suppose that is a reference, again, to the complaint. But the date of the explanation is a month later. This whole series doesn't mean anything unless and until we can have the complaint which Ebsary made against Kelley, which is dated April 1, and which the Government has.

Justice Stephens: Can't the Government produce this letter of April 1?

Mr. Knuff: I will make an attempt to get it. I am frank to say that in the file that I was using for the preparation of this testimony, the letter of April 1 wasn't in there, or at least if it was I overlooked it. I will make an effort to find that letter of April 1, and see if we have it.

Mr. Bromley: Don't you have a file of the exhibits in the criminal case?

Mr. Knuff: Yes, we do.

Mr. Bromley: Does your file disclose the exhibit number of Exhibit 515, the exhibit number in the criminal trial?

Mr. Knuff: Exhibit 515 is Government's Exhibit No. 62 in the criminal trial.

4226 Justice Stephens: And it so shows on this photostat.

Mr. Bromley: Then this missing document will probably be Government's Exhibit 60 or 61 in the criminal trial.

Justice Stephens: It will be better, I think, to suspend a ruling on that offer until you find it, because these do not seem related and consequently do not seem intelligible, and we don't want to get anything in the record here that may cause a misunderstanding.

Mr. Knuff: I have here the testimony in the criminal case, and it may be that—

Justice Stephens: (Interposing) Have you the exhibits in the criminal case in the court room?

Mr. Knuff: I don't have the exhibits themselves, but I have the testimony.

Justice Jackson: Have you an index of them?

Mr. Knuff: That is what I am looking at now.

Justice Stephens: We will take a recess for five minutes at this time, and maybe you can find it in the meantime.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

4227 Justice Stephens: Proceed.

Mr. Knuff: The ruling on Exhibits 512 to 515, inclusive will be held in abeyance?

Justice Stephens: Yes.

By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked for identification as Government's Exhibit 516, the same being a letter, dated September 11, 1936, addressed to George N. Lenci, and signed United States Gypsum Company, C. Henning—

Justice Stephens: (Interposing) Mr. Knuff, those rulings which were held in abeyance are on Exhibits 512, 513, 514 and 515, is that right?

Mr. Knuff: 512, 513, 514 and 515, your Honor.

Justice Stephens: What is the next one?

Mr. Knuff: This will be Government's Exhibit 516. It is a letter dated September 11, 1936.

(The document referred to was marked as Government's Exhibit No. 516, for identification.)

By Mr. Knuff:

Q. Did you receive that letter, Mr. Lenci? A. Yes.

Mr. Knuff: I offer in evidence Government's Exhibit 516.

Mr. Johnston: Now if the Court please, I understand that these exhibits that the Government is starting
4228 on now have not been handed around so we haven't seen any of them.

Mr. Knuff: They were put on the clerk's desk this morning.

Mr. Johnston: That doesn't do us any good. We were supposed to receive them the day before. What we have been working on up to date are those that were given to us last week. Now these I have not seen.

Justice Stephens: Where is the set for defendants' counsel; are they still on the clerk's desk?

Mr. Bromley: We have one set here.

Justice Stephens: Then take your time and look at them.

Mr. Knuff: I might say that the reason that they weren't furnished before was because of the twenty-four exhibits originally proposed, which we have now eliminated this afternoon. We didn't tailor our case exactly the way it should have been tailored.

Mr. Bromley: We make the usual objection.

Justice Stephens: Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 516 was received in evidence.)

By Mr. Knuff:

Q. I show you, Mr. Lenci, Government's Exhibits 517 and 518 for identification, Exhibit 517 being a copy of a letter dated September 14, 1936, addressed to Mr.
4229 C. F. Henning, and signed Ebsary Gypsum Company, George N. Lenci, Secretary; and Government's Exhibit 518, being dated September 18, 1936, addressed to George N. Lenci, Secretary, and signed United States Gypsum Company, C. Henning, Vice President. Exhibit 518 apparently is a reply to your letter of September 14, 1936, which is marked for identification as Government's Exhibit 517.

(The documents referred to were marked as Government's Exhibits Nos. 517 and 518, for identification.)

By Mr. Knuff:

Q. Did you send the original of Government's Exhibit 517, and did you receive in reply thereto, Government's Exhibit 518? A. Yes.

Mr. Knuff: I offer in evidence Government's Exhibits 517 and 518.

Mr. Bromley: We make the usual objection.

Justice Stephens: Received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents marked as Government's Exhibits Nos. 517 and 518 were received in evidence.)

By Mr. Knuff:

Q. On Government's Exhibit 518, Mr. Lenci, I notice
4230 opposite the last paragraph, and to the left there, a notation in pencil. Is that in your handwriting? A. Yes, it is.

Q. Will you translate that, and explain what it means? A. Well, it reads, "Did this before writing".

Q. And by that, what do you mean, Mr. Lenci? A. That refers to the last paragraph in Mr. Henning's letter of September 18, in which he suggested that I get in touch with Mr. Gallagher, of the United States Gypsum Company, so as to get more information from him as to the competition from other materials.

Q. And your notation, "Did this before writing" indicates that you had already done what Mr. Henning suggested in his letter, is that correct? A. Yes.

Q. Now in the last paragraph of the letter, the fourth line down, Mr. Henning refers to Ecod wood lath. What is Ecod? A. Well, Ecod was a combination lath made up of a wire mesh, with very large meshes, backed up with a paper.

Q. It wasn't metal lath? A. It was not metal lath, it was a very cheap product that came in rolls and it was used in what we call, around New York, the speculative apartment houses.

Q. Was it used as a base for plaster? A. Yes.

4231 Q. And it was a trade name of what lath, or what base—or was it a trade name? A. It was a trade name.

Q. And by whom was Ecod put out? A. I was going to say Reynolds, but I am not certain of that.

Q. I show you what has been marked for identification as Government's Exhibit 519, the same being a letter dated July 20, 1938, addressed to Mr. Lenci, and signed E. J. Blanchfield.

(The document referred to was marked as Government's Exhibit No. 519, for identification.)

By Mr. Knuff:

Q. Did you receive that letter, Mr. Lenci? A. Yes.

Justice Jackson: Who is Mr. Blanchfield?

The Witness: Blanchfield was our Boston representative.

By Mr. Knuff:

Q. I show you what has been marked Government's Exhibit 520 for identification, the same being a copy of a letter, dated July 22, 1938, addressed to United States Gypsum Company, and signed Ebsary Gypsum Company, George N. Lenci, Vice President.

4232 (The document referred to was marked as Government's Exhibit No. 520, for identification.)

By Mr. Knuff:

Q. Will you state whether or not that is a copy of a letter, the original of which was sent to the United States Gypsum Company? A. Yes.

Q. I show you what has been marked for identification as Government's Exhibit 521, and also what has been marked for identification as Government's Exhibit 522; Government's Exhibit 521 is a copy of a letter, dated August 30, 1938, addressed to United States Gypsum Company, signed Ebsary Gypsum Company; and Exhibit 522 is likewise a copy of a letter, dated September 15, 1938, addressed to the United States Gypsum Company and signed George N. Lenci.

(The documents referred to were marked as Government's Exhibits Nos. 521 and 522, for identification.)

By Mr. Knuff:

Q. Will you state whether or not the originals of those two letters were sent to the United States Gypsum Company? A. Yes, they were.

Mr. Knuff: I offer in evidence Government's Exhibits 519, 520, 521 and 522.

4233 Mr. Bromley: We make only the usual objection.

Justice Stephens: Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents marked as Government's Exhibits Nos. 519 to 522, inclusive, were received in evidence.)

By Mr. Knuff:

Q. I show you what has been marked for identification as Government's Exhibit 523, the same being a letter, dated July 31, 1939, addressed to Mr. Fred Ebsary, and signed Ezra Sensibar, President, Cardiff Gypsum Company.

(The document referred to was marked as Government's Exhibit No. 523, for identification.)

By Mr. Knuff:

Q. Was that letter received at your company's office? A. Yes.

Q. I show you a copy of a letter which is marked for identification as Government's Exhibit No. 524, the same being a carbon copy of a letter dated August 3, 1939, addressed to the Cardiff Gypsum Company, and signed George N. Lenci.

(The document referred to was marked as Government's Exhibit No. 524, for identification.)

By Mr. Knuff:

4234 Q. Was the original of that letter sent to the Cardiff Gypsum Company? A. Yes, it was.

Q. I show you what has been marked for identification as Government's Exhibit 525, the same being a letter, dated August 3, 1939, addressed to George N. Lenci, and signed Cardiff Gypsum Company, M. Gutman.

(The document referred to was marked as Government's Exhibit No. 525, for identification.)

By Mr. Knuff:

Q. Was that letter received by your company, Mr. Lenci? A. Yes.

Q. I show you what has been marked for identification as Government's Exhibit 526, the same being a copy, of a

letter, dated August 10, 1939, addressed to the Cardiff Gypsum Company, and signed George N. Lenci.

(The document referred to was marked as Government's Exhibit No. 526, for identification.)

By Mr. Knuff:

Q. Was the original of that letter sent to the Cardiff Gypsum Company? A. Yes.

Q. I show you what has been marked for identifi-
4235 cation as Government's Exhibit No. 527, the same being a copy of a letter, dated September 18, 1939, addressed to the Cardiff Gypsum Company and signed George N. Lenci.

(The document referred to was marked as Government's Exhibit No. 527, for identification.)

By Mr. Knuff:

Q. Was the original of that letter sent? A. Yes.

Q. I show you—

Mr. Bromley: (Interposing) May it please the Court, I now notice that there are some thirty-five, approximately, of these documents, and I recognize them as having been introduced in the criminal case.

It is our position that they are entirely immaterial to any issue in this case, and I would like to state that now to save, if possible, the reading of all these documents, since it seems to be Mr. Knuff's intention to mark them, but not offer them until he gets all through.

I think Mr. Knuff will agree that the documents have only to do with the refusal of the United States Gypsum Company to grant a consent to the Ebsary Gypsum Company to sell this company board.

Now, as I read the complaint, there is no charge in the complaint that has anything to do with this. This
4236 company was not named in the Bill of Particulars as a manufacturing distributor, and there is no charge, as I see it, to which any of these letters could possibly have any relevancy.

Mr. Knuff: The letters are being offered for two reasons, your Honor. In the first place, it will be shown by either these letters, or by Mr. Sensibar himself, that Mr. Sensibar—

Justice Garrett: (Interposing) Would you mind facing the Court, Mr. Knuff? I can't hear you.

Mr. Knuff: I am sorry—that Mr. Sensibar's company, the Cardiff Gypsum Company, was a plaster manufacturer; that his company endeavored to purchase board from various companies, including this defendant; that his company had a reputation for cutting the price of plaster; that United States Gypsum refused permission to the Ebsary Gypsum Company to sell board to the Cardiff Gypsum Company.

These letters will not show that, but other testimony will show that. Likewise, that the United States Gypsum Company refused American, National and Certain-teed permission to sell board to the Cardiff Gypsum Company.

These are being offered for two reasons; first, we contend that they were trying to control the plaster prices, and because Ebsary had the reputation for cutting price on plaster—

Justice Stephens: (Interposing) Do you mean Ebsary?

Mr. Knuff: Cardiff Gypsum Company—because Cardiff had the reputation for cutting the price on plaster,
4227 they wouldn't make the board available to Cardiff when board would aid Cardiff in selling plaster.

These are also offered under paragraph—

Justice Stephens: (Interposing) Before you get to the second part. What charge in the complaint covers the first item you have referred to?

Mr. Knuff: That is in 45 (c), "concertedly raising, maintaining and stabilizing the general level of prices for plaster", and so forth.

Here you have a negative stabilization of the plaster prices in the refusal of the United States Gypsum to give their consent to their licensees to sell board to a manufacturer who had the reputation of cutting the price of plaster.

The second theory on which these are offered is contained in paragraph 121 of the complaint, that they "have completely eliminated from the distributive system wholesale distributors who might fail to maintain said prices". That is the last part of the last sentence of paragraph 121.

Justice Garrett: You wish to show, do you, that there was an effort on the part of some dealers or jobbers, or whatever you want to call them—we will cut out those names for the time being—by reducing the price of plaster upon which there was no patent, and which was not included in the license agreements, that they avoided the effect of

the price fixed under the license agreements upon the
4238 patented products, by selling plaster at a low rate and thereby violated the license agreements, and that the defendants objected to that and prevented it. Is that what you intend to prove?

Mr. Knuff: No, your Honor. The defendants themselves have tied the price of plaster to the price of board by their license bulletins. In their license bulletins it says that although board may ostensibly be sold at a certain price, nevertheless, if plaster or other products are sold at a less price in order to influence the sale of the board—

Justice Jackson: (Interposing) Less than what, less than the market price?

Mr. Knuff: Yes,—that that would be considered a violation of the license agreements.

Now here we have a plaster manufacturer who had the reputation for selling plaster at cut prices—

Justice Garrett: (Interposing) What do you mean by "here"?

Mr. Knuff: In the Cardiff Gypsum Company case.

Justice Jackson: At less than the market price?

Mr. Knuff: Yes. The Cardiff Gypsum Company had the reputation of selling plaster at reduced prices. The Cardiff Gypsum Company, in order to aid their plaster sales, wanted to have a board line. The Cardiff Gypsum intended to get board from the Ebsary Gypsum Company.

The Ebsary Gypsum Company under the license agree-
ment could not sell to another manufacturer without
4239 the consent of the licensor. Ebsary endeavored to get that consent from the licensor, and the licensor refused to give that consent.

That is the only case we know of where a manufacturer was refused permission to buy board, and we contend that the reason why they were refused was because USG knew of their sales policies with reference to plaster, and because they had a reputation of being a price cutter on plaster, USG refused to give Ebsary the consent to sell board to them.

This would be evidence, certainly, of the allegations contained in paragraph 45 (e), that is, of, "concertedly inducing and coercing manufacturing distributors to resell at the prices raised and fixed by said companies as aforesaid, gypsum board purchased from said companies".

Justice Jackson: They wouldn't have much of a market, would they, if they sold to many people like you say this

Sensibar outfit is? If they could indulge in what is sometimes called a "gift enterprise" and sell them ostensibly the board at dealer's price, and give them, as a gift, the gypsum, where would their market be? They would be just cutting their own throats, wouldn't they?

Mr. Knuff: That may be the case, but nevertheless we would like to show all the facts in this case.

Justice Stephens: Mr. Knuff, I am misled now. I thought a moment ago you said you were offering this evidence under paragraph 45 (c), but now you are
4240 talking about 45 (e). Cardiff wasn't a manufacturing distributor, were they?

Mr. Knuff: Yes, they were a manufacturing distributor.

Justice Stephens: Was it one of the manufacturing distributors mentioned in the Bill of Particulars, or complaint, as having its resale prices fixed?

Mr. Knuff: It is my best recollection that we have specifically mentioned the Cardiff Gypsum Company in the Bill of Particulars.

Justice Stephens: Is that correct?

Mr. Bromley: No, that is not correct.

Mr. Knuff: I may be wrong as to that.

Mr. Bromley: We have got the Bill of Particulars right here. You can look at it.

(Whereupon, copy of the Bill of Particulars was handed to Mr. Knuff.)

Mr. Knuff: Cardiff is not mentioned; I thought it was.

Justice Stephens: Then you do not rely on paragraph 45 (e), but simply on 45 (c).

Mr. Knuff: Well, it would still be evidence, not to prove that that particular company's price was fixed, but it would still be evidence from which the Court could infer that the United States Gypsum Company was fixing the prices of manufacturing distributors.

Justice Stephens: I thought that we ruled, in these reserved rulings of which we had so many not long
4241 ago— (after referring to the rulings of the Court) —no, I had in mind the ruling under Topic V, where we all agreed that the objection to the Perry testimony should be sustained, and the motion to strike granted on the ground that there was no charge in the complaint of resale price fixing on plaster, board and other gypsum products by wholesalers, as distinguished from manufacturing distributors.

You claim that this company is a manufacturing distributor and you claim that you have a right to show that the defendants fixed the resale price of this manufacturing distributor, in order to prove that they fixed it on someone else's products that someone else being a manufacturing distributor, although Cardiff is not so charged?

Mr. Knuff: That is right, your Honor.

Justice Jackson: That is for plaster, not patented board?

Mr. Knuff: For both.

Justice Jackson: Under 45 (c)?

Mr. Knuff: That only applies to gypsum board, but it is evidence to—

Justice Jackson: (Interposing) Paragraph 45 (c) applies to gypsum board?

Mr. Knuff: I beg your pardon, I was looking at 45 (e). 45 (c) applies to plaster.

Justice Jackson: 45 (e) is out, isn't it, because Cardiff is not included—

4242 Mr. Knuff: (Interposing) We are not offering it to show the truth or falsity of their refusal to sell board to Cardiff, but we say, from the fact that they did refuse to sell them, that the Court could infer that they also refused to sell other manufacturing distributors whose names are mentioned in the Bill of Particulars, unless they maintain prices.

Justice Stephens: Well your first argument was, as I understood it, that you have a right to show, by these letters, and other letters, and other testimony, that USG refused to permit Ebsary and other licensees to sell gypsum board to Cardiff, because Cardiff was known to be a price cutter on plaster, and that that tends to prove the allegations of paragraph 45 (c), "concertedly raising, maintaining, and stabilizing the general level of prices for plaster and miscellaneous gypsum products manufactured and sold by said companies in the Eastern area".

And you also offer the same evidence under paragraph 121, the last sentence of which charges the elimination, "from the distributive system (of) wholesale distributors who might fail to maintain said prices".

Well, the whole of paragraph 121 refers to plaster, miscellaneous gypsum products, and board. The last sentence merely says, "For the purpose of maintaining said uniform and noncompetitive prices, the defendants have

standardized the manufacture of board, have limited
4243 said distribution of board to themselves and to certain manufacturing distributors, and have completely eliminated from the distributive system wholesale distributors who might fail to maintain such prices."

I suppose that might be broad enough to apply to plaster prices.

Now what do you say, Mr. Bromley, as to their admissibility under those two paragraphs of the complaint?

Mr. Bromley: I think it should be borne in mind first, that the indictment in paragraph 18 specifically charged that:

"Pursuant to the combination and conspiracy, USG refused to permit manufacturers to sell, and manufacturers refused to sell, gypsum board to companies selling gypsum products at wholesale other than those named as co-conspirators named herein, because of the reputation of said companies for selling gypsum products at prices below prevailing prices".

And the Bill of Particulars that we got under that section named Cardiff. Now there is nothing like that section in the bill of complaint. This time, when we asked for a list of the manufacturing distributors, Cardiff was not named.

So against that background it seems to me there should be considered the thought now of whether it is covered by the complaint. I think that is a plain afterthought, and the two documents show very clearly that it was never intended to cover this situation by the complaint, but to cover it solely by the indictment.

4244 It seems to me that paragraph 45 (c) is plainly out, as Judge Jackson has said, because it does not refer to board, but just refers to plaster and other gypsum products than board.

In 45 (e) there is an allegation that the conspirators coerced the manufacturing distributors to maintain resale prices. I don't see how it is possible to assert that because USG did a perfectly lawful thing, it seems to me, in refusing to grant its consent to Ebsary to sell someone not named to be a manufacturing distributor, although very probably in fact a manufacturing distributor, that that is necessarily support to a charge that we conspired to force these manufacturing distributors to maintain prices on board—and that is the only charge, there is no charge that we conspired

to force manufacturing distributors to maintain resale prices on plaster.

How does our refusal to sell Cardiff tend in any way to prove the charge that we agreed to coerce the manufacturing distributors to maintain resale prices on board?

As far as paragraph 121 is concerned—

Justice Stephens: Before you go to paragraph 121, repeat your statement as to 45 (c), in which you referred to Judge Jackson's point, please. I didn't clearly get that.

Mr. Bromley: The only allegation there is that the conspirators agreed to maintain the prices of plaster and miscellaneous plaster products other than board.

4245 I don't see how evidence that USG refused to permit Ebsary to sell board to Cardiff could in any way support a charge that the defendants agreed among themselves to stabilize the price of plaster.

Justice Stephens: Well, the argument of the Government, as I understand it, was that Cardiff was trying hard to get some board and couldn't get it, and that the Government has a right to try to show that the reason Cardiff couldn't get it was because it was a price cutter on plaster, and that that is circumstantial evidence tending to prove that the defendants were conspiring to keep the price of plaster up, i.e., they wouldn't sell to people who kept it down, wouldn't even sell board to them.

Mr. Bromley: Now as we have all agreed, there is no charge in the complaint that the defendants fixed the resale price of plaster, or fixed any other price of plaster than their own.

So that even on that theory, it seems to me to be remote to try to prove that we refused our consent to Ebsary to sell board to Cardiff, even though Cardiff was manufacturing plaster and even though Cardiff may have had a reputation as a price cutter.

Justice Stephens: Well, wouldn't it be some evidence tending to prove that the defendants kept their own prices on plaster up, if they tried to get rid of the fellow who

4246 cut the prices on plaster, because a lower price on plaster, by whomsoever sold, would tend to make it difficult to keep the price on plaster up, that is, of the plaster sold by the defendants themselves.

Mr. Bromley: Well, that might possibly be.

Justice Garrett: As a matter of fact, did this Cardiff Company manufacture plaster?

Mr. Bromley: Yes, sir.

Justice Garrett: They manufactured plaster, sold their own plaster manufactured by them, at a price which they fixed?

Mr. Bromley: Yes, sir. Of course when you get through with the whole line of testimony, all it shows is that the United States Gypsum Company refused to give its consent, which I assume anybody would say was perfectly lawful.

Ebsary was trying hard enough to get it, and we just told them no, that they couldn't have it. So again it doesn't prove a conspiracy. It proves the opposite. Ebsary would have very much liked to sell this company board, and we didn't want to give our consent, and we didn't.

Justice Stephens: What about paragraph 121, Mr. Bromley?

Mr. Bromley: Paragraph 121 is under the effect of the combination. It is not a charge of the combination or its scope. The last sentence to which counsel refers, or the last part of the last sentence, "have completely eliminated
from the distributive system wholesale distributors
4247 who might fail to maintain said prices", I think
plainly refers to jobbers. I think a reading of the whole complaint shows that reference is to the allegations in paragraph 94 that we conspired to sell only to jobbers who sold to dealers, who maintained bulletin prices.

I did not before understand that the use of the words "wholesale distributors" was ever intended to broaden the scope of the allegations of the conspiracy, and I think all of us have understood that to mean merely jobbers.

Justice Stephens: Do you wish to be heard, Mr. Knuff?

Mr. Knuff: No, your Honor, I think not.

Justice Stephens: Of course there is no offer before the Court, but the Government states that exhibit numbers—

Mr. Knuff: (Interposing) Beginning with Exhibit 523 and going to 527, so far.

Justice Stephens: (Continuing) Exhibits 523, 524, 525, 526, and 527 are to be offered—do you offer them at this time?

Mr. Knuff: We will offer them, but we have not offered them yet. There are probably nine or ten other letters in this series—

Justice Jackson: (Interposing) Is Mr. Bromley correct, that there are approximately thirty-five documents, beginning with Exhibit 523, all dealing with the refusal of USG to permit Ebsary—

4248 Mr. Knuff: (Interposing) Yes, all dealing with that general subject.

Justice Stephens: There is nothing before the Court to rule on, but for the guidance of counsel we may say that if these letters, Exhibits 523 to 527, inclusive, are to be offered on the theory that the Government states—which I need not repeat because it is clearly stated on the record—that all of us are agreed, all of the Judges, that they are not admissible under paragraph 45 (e).

Judge Jackson and I are of the view that they are admissible under paragraph 45(c), where it is charged that the defendants concertedly raised, maintained and stabilized the general level of prices for plaster and miscellaneous gypsum products.

We think the proffered evidence may possibly support an inference that the defendants were trying to keep their own prices on plaster up, by keeping the prices of other people up, although it seems to Judge Jackson and myself that it might support a different inference, that it was a kind of indirect rebating or gift enterprise.

Judge Garrett is doubtful, I think, whether the evidence is admissible on any theory. In fact, I think it is his view that is not admissable under any theory of the complaint.

But since the majority of the Court think it is admissible, without commenting on its weight, this sugges-

4249 tion is made by Judge Jackson, which seems to me worthy of your consideration, Mr. Knuff.

If you have got thirty-five, or any such large number of letters of this sort, since there seems to be no dispute by the defendants, why cannot it be agreed or stipulated that the United States Gypsum Company did decline to permit Ebsary and other licensees, if that is the fact, to sell board to the Cardiff Gypsum Company? That, at least, I should think could be stipulated to if it is true, and if it cannot be stipulated to that the Cardiff Company was a price cutter on plaster, you could prove that by someone else. By this method I think we could probably save half a day's work.

Mr. Knuff: If Mr. Bromley is willing to stipulate to that effect, all right.

Mr. Varian: Do these exhibits only apply to Ebsary's application, and the refusal of USG to give Ebsary the necessary consent to sell Cardiff at a discount?

Justice Stephens: That is my understanding.

Mr. Varian: They only apply to the Ebsary Company?

Justice Stephens: Yes.

Justice Jackson: But our understanding is that this is part of a chain of proof by which the Government would attempt to show that the other licensees were prohibited from selling to Cardiff.

Mr. Varian: All I know is what transpired in the
4250 criminal case, and my recollection is that there was no such evidence of refusal by USG. I think there, the other companies on their own account refused to sell to Cardiff.

Mr. Bromley: I will stipulate now that USG refused to grant the consent which Ebsary requested from it, under its license, for permission on Ebsary's part to sell patented board, manufactured by Ebsary, to the Cardiff Gypsum Company.

Justice Stephens: Thank you, Mr. Bromley. That stipulation, I should think, would save a great deal of proof.

Mr. Knuff: I think it will. You can see why we couldn't charge these people with regulating the price of the board sold by Cardiff, because Cardiff never sold any.

Mr. Bromley: I think I should add to that statement, that this occurred in October, 1939.

Justice Jackson: That is, the final refusal?

Mr. Bromley: Yes.

Justice Stephens: Now the Court has held in abeyance the ruling on Exhibits 512, 513, 514 and 515, in order for the Government to try to produce the letter of April 1st—

Mr. Knuff: (Interposing) That is Government's Exhibit 61 in the criminal trial, I believe.

Justice Stephens: See if you can have that here in the morning so that we can get that ruling cleared up.

In view of this stipulation by Mr. Bromley, you can perhaps, during the evening, eliminate a lot of these exhibits.

4251 Mr. Knuff: Yes, sir.

Justice Stephens: Announce the recess until tomorrow.

(Thereupon, at 4:05 o'clock p.m., an adjournment was taken until 10:00 o'clock a. m., Tuesday, February 22, 1944.)

4253 IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA,

Plaintiff,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS,

Defendants.

Seventh Floor,
Internal Revenue Building,
Washington, D. C.,
Tuesday, February 22, 1944.

The above-entitled cause came on for further hearing at 10:00 o'clock a. m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

APPEARANCES:

(Same as heretofore noted.)

4259 You may proceed with the examination.

Mr. Steffen: I should like to make a short statement in the nature of a correction of the record.

I think yesterday, in connection with the Cardiff letters that were being offered in evidence, the question arose concerning who was a manufacturing distributor, and the nature of our bill of particulars in connection with who was a manufacturing distributor.

It was called to our attention by Mr. Bromley that the Cardiff people were not named as manufacturing distributors, and I gathered from Your Honors' action that maybe

that entered into your calculations in reaching the conclusion that perhaps that evidence was not admissible under our Paragraph 45 (e).

The bill of particulars, and the answer to the bill of particulars, were addressed to Paragraph 42 of the complaint, and Paragraph 42 of the complaint is a general statement concerning the distribution of gypsum board through plaster manufacturers. What it says is that:

"The defendant companies sell in interstate commerce a substantial part of the gypsum board manufactured by them to various small manufacturers of calcined gyp-
4260 sum and plaster not engaged in the manufacture of gypsum board, sometimes referred to hereinafter as manufacturing distributors."

Now in answer to the question posed by the motion for a bill of particulars as to who we meant by manufacturing distributors, it is true that we did not mention the Cardiff Gypsum Company; and it is obvious that we couldn't have mentioned the Cardiff Gypsum Company, because they never sold to the Cardiff Company, it was not a manufacturing distributor. It is true, on the other hand, that it was a plaster manufacturer to whom, in ordinary course, these defendants should have sold gypsum board just as they did to the other plaster manufacturers who have become distributors.

Our contention is, and this evidence is offered upon the ground, that their refusal, the defendants' refusal to sell to a plaster manufacturer who satisfies credit requirements, who is in the same category as are the other plaster manufacturing distributors to whom they did sell, is very strong evidence of their purposes to maintain prices; and that when we offer this evidence, coupled with further evidence, indicating that their refusal was upon the ground, largely, that the Cardiff people had a bad reputation in the past for cutting prices on plaster, and therefore, of course, affecting the plaster market, it is very strong evidence, as we see it, to establish that they were attempting to maintain prices under paragraph 45(a) and also 45(e)
4261 of the complaint, as well, of course, as 45(c), upon which Your Honors stated that the evidence was admissible.

I might call Your Honors' attention to the case of the Ethyl Gasoline Corporation v. United States, which is in 309 U. S., and is our general authority for the proposition that where defendants gather together and refuse to sell, or refuse to consent to a sale to jobbers, for the reason

that the jobbers may not maintain prices, that that is a straight violation of the Sherman Act.

But what I wanted to say primarily was to clear the record on the matter of our not having named the Cardiff people as a manufacturing distributor. In the nature of the case, we could not name them as a manufacturing distributor, because USG refused to allow them to be a distributor at all. They were, however, plaster manufacturers.

Justice Stephens: Mr. Steffen, paragraph 45(e) charges: "concertedly inducing and coercing manufacturing distributors to resell, at the prices raised and fixed by said companies as aforesaid, gypsum board purchased from said companies."

Mr. Steffen: That is right.

Justice Stephens: Now whether or not you named Cardiff as a manufacturing distributor, how could the evidence which you offered, which is evidence that the defendants refused to sell board to Cardiff, prove that they fixed its price?

4262 Mr. Steffen: We don't, of course, wish to say that they fixed the price of the Cardiff people, because they did not. What we offer it for is as evidence from which Your Honors could infer that they did fix and control the prices of manufacturing distributors because, when they were offered an opportunity to sell to a plaster manufacturer whose prices they were afraid they couldn't control, they refused to sell to him.

This is the one example that we have of where they have refused to sell to a plaster manufacturer, and we expect to establish that they refused to sell to this plaster manufacturer on the same basis that they were otherwise selling to manufacturing distributors, for the reason that this plaster manufacturer had a bad reputation for cutting prices; and that therefore it is evidence, we feel, from which the Court could infer that as respects those who were manufacturing distributors, they could control and did control the resale prices.

That is the argument that we wish to advance.

Justice Stephens: I want to be sure I understand it, because I thought we ruled that the proffered evidence was not admissible under paragraph 45(e). I am sure we did.

Mr. Steffen: I think so, but I think it was on a misconception concerning our bill of particulars.

Justice Stephens: I understand why you are making the statement, and therefore I want to understand your statement.

4263

I don't yet understand how evidence that the defendants refused to sell board to Cardiff could tend to prove that they were fixing the price of other manufacturing distributors on board, since this company was only a plaster price-cutter.

Mr. Steffen: On that I will say this, that the defendants' contention is that when there is a cutting of prices on plaster sold in conjunction with board, that that constitutes a cutting of the price of board,—we pointed that out in Bulletin No. 5,—and that therefore, when they are faced with the problem of whether they want to sell to Cardiff, and they have this reputation of Cardiff cutting the price of plaster, they say that that constitutes an indirect rebate or cut on the price of board and therefore he wouldn't be maintaining the established bulletin prices on board as they see them; and, therefore, it seems to us to be very strong evidence that as respects those distributors to whom they do sell, they sell to them for the reason that they will maintain the prices, the resale prices on board. And I think our evidence will be overwhelming that they all have maintained the resale prices on board, and there was the possibility that Cardiff would not do that which, according to their own contentions, constitutes an indirect cutting of the price on board by virtue of their refusal to maintain the "established" prices on plaster.

4264

Justice Stephens: Do you wish to be heard, Mr. Bromley?

Mr. Bromley: No, Your Honor.

Mr. Steffen: I might say that the bulletin provision to which I referred is Government's Exhibit 37 at page 531, and it appears in the complaint at the top of page 96; and that is the provision that any lowering of the price of other commodities sold in conjunction with board will, according to the licensor, constitute a reduction in price of the board and will be contrary to the agreement.

Justice Stephens: Well, I confess, Mr. Steffen, that I am completely at sea as a result of your statement this morning, and the Court is in a state of unhappy division on the subject, because Judge Garrett doesn't think this evidence is admissible at all, and so ruled yesterday. Judge Jackson and I thought yesterday that it was admissible under 45(c).

Mr. Steffen: I think it is admissible under 45(c)—

Justice Stephens: (Interposing) But we ruled definitely yesterday that it was not admissible under 45(e). I can't see yet how it is admissible under 45(e). It seems to me that Mr. Knuff and Mr. Steffen are arguing contrary in-

ferences. It seems to me that Mr. Steffen is arguing
4265 that it is admissible on the "gift enterprise" theory under the bulletins, which theory has been discussed here very frequently and with which I am thoroughly familiar,—that a refusal to sell to a plaster manufacturer who cuts plaster prices might be evidence that the defendants didn't want a gift enterprise operating which would be an indirect rebate on the price of board. Well, that is one inference which may possibly be drawn from the refusal to sell a plaster manufacturer who is supposed to be a price cutter on plaster.

But Mr. Knuff is offering the evidence, as I understood it yesterday, on the theory that the refusal to sell a plaster manufacturer who was reputed to cut plaster prices supported an inference that the defendants were trying to keep the price of plaster up.

Mr. Steffen: I think they are both consistent, Your Honor.

Justice Jackson: That is your theory now, isn't it?

Mr. Steffen: Yes. Both are consistent. The same evidence as respects price cutting on plaster comes in under 45(c) for the reason that the defendants are charged with attempting to fix a price on plaster; and this evidence would indicate that they were not willing to sell to a plaster manufacturer, sell board to him, where that would increase his strength and where they would like to really
4266 eliminate him. I don't think it is highly essential, so long as it comes in under one or the other. I wanted to clear the record on the manufacturing distributor question.

Justice Stephens: You are entitled to do that.

But the Court has now ruled by a majority vote that this evidence is not admissible under 45(e). If that ruling stands, I take it you will assert it as error if the Government does not prevail in the case, but I confess that I can't see it under 45(e). It may be that I am obtuse about it.

Mr. Steffen: I want to make it clear also that we think it is relevant under 45(a), which has to do with the general control of prices to dealers.

The principal thing, or let us say the most important thing in this complaint is the control of prices from manufacturers to dealers, and this evidence would indicate that they were unwilling to sell to any plaster manufacturer who would not maintain the regular dealer prices, either directly upon the board, or indirectly by cutting the price of

plaster. And we consider that the evidence, therefore, is admissible on that score, as well.

Justice Garrett: Let me ask you there—you say that they were unwilling to sell to a manufacturer of plaster who cut prices—

Mr. Steffen: (Interposing) On plaster.

4267 Justice Garrett: Yes, on plaster. I don't know, of course, what the cutting of the price of plaster meant. There was no fixed price. But you say they were unwilling.

Now so far as I get this, Ebsary wanted to sell to them?

Mr. Steffen: That is right.

Justice Garrett: And USG said, "No, you can't sell, we will exercise the control we have under our contract based upon the patents, and you can't sell."

Well, if Ebsary was trying to sell, and USG, in the exercise of a lawful right, assuming it was lawful, refused permission, how, then, would that bring Ebsary into a conspiracy?

Mr. Steffen: It doesn't look like a voluntary conspiracy, does it?

I would like to answer that, because I think Mr. Bromley stated yesterday that it was lawful, and I think Your Honor stated this morning that it might be regarded as lawful.

Justice Garrett: I said "if lawful".

Justice Jackson: "Assuming it was".

Mr. Steffen: Yes, "assuming it was". And I want to state that we do not grant that it is lawful for a group, USG and the other licensees together, to refuse to sell to any person for the reason only, as we expect to

4268 develop here, that he is a price cutter.

Now, reaching your direct question, how does it constitute a conspiracy? The fact is this, as we will establish, that Mr. Sensibar tried not only with Ebsary, but with a number of other manufacturers, to procure a supply of board. I believe the American, early in the game, were willing to sell to the Cardiff Company, and USG refused to grant consent, presumably for exactly the same reason, that is, that they were afraid Cardiff would cut the price on plaster, and therefore on one side depreciate the plaster prices and on the other give a rebate on their board, which was a double violation, as they saw it.

Now let's carry it on farther. Actually what happened is that each of these licensees and the licensor all refrained

from selling to Cardiff. Now it may not be a voluntary conspiracy. It is true that Ebsary wanted to sell to begin with, but when the chips were down Ebsary didn't sell. In other words, they are in an agreement, the whole industry is in an agreement not to sell to Cardiff. It is the same proposition you have in your bank robbery—conspiracy. Here are four or five robbers that want to rob a bank, and they want somebody to drive a car, and they grab him and he says, "I don't want to go with you people." But nevertheless, if he drives the car and takes the robbers away from the scene of the robbery, you have a conspiracy
4269 and he is part of it.

These people are, we contend, conspirators, because that is what they actually did. And from the standpoint of the policy of the Sherman Act, which is to free the sale of commodities, we have a situation where we have a plaster manufacturer, with sufficiently good credit, who would normally be a proper person to buy board, who is refused a supply; and he is not refused a supply by one single person, he is refused a supply, when it adds up, by all of them.

And as I think we have said many times, and as the cases have said many times, what one person might do individually, that is, perhaps USG might refuse to sell individually and that would not constitute an offense—but a group of individuals may not combine to refuse to sell. And it becomes an offense when they all conspire or all agree together, however unwillingly, not to sell to a particular person. That is brought out by, I think, the Ethyl Gasoline case which we cited; and the principal authority to the contrary is the Colgate case, which is a single trader case, and that simply says that one trader may refuse to sell his products to a person whom he thinks is likely to cut prices.

But this is an agreement on the part of the total source of supply in the country, in effect, not to sell to
4270 Cardiff.

Justice Stephens: Well, are you asking for some further ruling?

Mr. Steffen: Not at the moment. We will proceed to offer certain evidence, and the ruling will come up at that time.

Justice Stephens: Then such rulings as we have made will stand.

Thereupon, GEORGE N. LENCI the witness on the stand at the time of adjournment, resumed the stand and testified further as follows:

Direct Examination (resumed)

Mr. Bromley: May I, before Mr. Knuff starts, make this statement in connection with my stipulation on page 4544?

Justice Stephens: Just a minute, let me locate that.

Mr. Bromley: I should like the record to show that I make that stipulation subject, of course, to both of my objections: first, to the testimony on the ground that it is immaterial to any change in the complaint; and, second, subject to the usual objection.

Justice Stephens: Your stipulation is this:

"I will stipulate now that USG refused to grant the consent which Ebsary requested from it, under its license, for permission on Ebsary's part to sell patented
4271 board, manufactured by Ebsary, to the Cardiff Gypsum Company."

The record may show that your stipulation is made subject to those two objections; and that the objection as to immateriality is overruled, consistently with the reception of the evidence indicated yesterday; and that the evidence is received subject to the usual reservation with respect to declarations of alleged co-conspirators.

Mr. Bromley: Thank you.

Mr. Knuff: I believe Your Honor referred to Exhibit 516 and said there was a word or phrase used in that exhibit that wasn't quite clear, and as I understood the Court, the word was "cut-back"—is that correct?

Justice Stephens: I believe that is it.

Mr. Knuff: I can't see the word "cut-back" in the exhibit. I see "cut stock" in there, but I don't see "cut-back".

Justice Stephens: I am sorry, "cut stock" is the word. What is "cut stock"?

The Witness: Cut stock is the board which is cut up from the larger boards which have been damaged in manufacture.

Justice Stephens: I see. Cut stock is what I intended to ask about.

What is a purlin?

The Witness: In a steel building, there are the
4272 heavy girders that carry the main load, and then there are smaller beams running in the opposite direction, and those are generally spoken of as purlins.

Justice Jackson: In the opposite direction or at right angles to the heavy beams?

The Witness: At right angles to the heavy beams, and they are the support for the gypsum board.

Justice Stephens: Thank you.

Mr. Knuff: Yesterday, if Your Honors please, the question came up, in connection with Exhibits 512, 513, 514 and 515, that there was an exhibit referred to in Government's Exhibit 513, a complaint dated April 1, that probably should be included. We have found the complaint that was referred to in Government's Exhibit 513, and Mr. Bromley, I understand, is willing to stipulate that what I now ask to be marked as Government's Exhibit 513-A is the complaint that is referred to in Government's Exhibit 513.

Is that correct, Mr. Bromley?

Mr. Bromley: Yes.

(The document referred to was marked as Government's Exhibit No. 513-A for Identification.)

Justice Jackson: Have you copies for us?

Mr. Knuff: I haven't had an opportunity to get them photostated, but they will be photostated sometime
4273 today, and we will have them over for the Court just as soon as we possibly can get them over.

Justice Jackson: All right.

Justice Stephens: What is Mr. Bromley's stipulation?

Mr. Knuff: That Government's Exhibit 513-A for Identification is the complaint referred to in Government's Exhibit 513 for Identification.

Justice Stephens: Ruling was suspended on Exhibits 512, 513, 514 and 515. Are you offering 513-A?

Mr. Knuff: Suppose, for the purpose of clearing the record, I re-offer Government's Exhibits 512, 513, 513-A, 514 and 515.

Justice Stephens: Well, 513-A is not a re-offer. It has never been offered yet. You are now offering that?

Mr. Knuff: I re-offer all but 513-A, and offer 513-A.

Justice Stephens: Is there any objection now except the usual objection?

Mr. Bromley: No, sir.

Justice Stephens: They are received in evidence subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents referred to, marked as Government's Exhibits Nos. 512, 513, 513-A, 514, and 515, were received in evidence.)

4274 Justice Jackson: I wonder if you used the correct word. There is no "complaint" mentioned in Exhibit 513. It is the word "letter".

Mr. Knuff: Well, while they do use the word "letter" in Exhibit 513, I think they referred to the complaint.

Justice Jackson: You mean that the letter referred to in Exhibit 513 is Exhibit 513-A?

Mr. Knuff: That is right.

Mr. Bromley: And I so stipulate.

Justice Stephens: Very well. And please furnish the Judges the usual photostats.

Mr. Knuff: Yes, sir.

Mr. Bromley called the Court's attention to the fact that there were quite a number of letters concerning this one transaction, and we have gone through these letters, last night, and we have culled from them quite a number, and Mr. Grover tells me that Government's Exhibits 523 to 527 have been marked for Identification.

We would like at this time to have marked for Identification—

Justice Stephens: (Interposing) Just a moment, 523 to 527?

Mr. Knuff: That is what Mr. Grover tells me.

Justice Stephens: They have been marked but not yet offered.

4275 Mr. Knuff: That is right.

Now we would like to have marked for Identification Government's Exhibit 528, the same being a letter dated September 18, 1939, addressed to Mr. George N. Lenci, and signed M. Gutman.

(The document referred to was marked as Government's Exhibit No. 528 for Identification.)

Mr. Knuff: Also, we would like to have marked for Identification as Government's Exhibit 529—

Justice Stephens: Just a minute. Before you go any further, I thought the effect of the stipulation was to be that you would not have to introduce those letters.

Mr. Knuff: That wasn't my understanding.

4276 Justice Stephens: If you will read the last statement of the Presiding Judge appearing at page 4544 of yesterday's record, you will note that the idea was to save time.

There I stated:

"In view of this stipulation by Mr. Bromley, you can perhaps, during the evening, eliminate a lot of these exhibits."

The suggestion was made prior thereto, I believe by Justice Jackson, that if possible a stipulation might be entered into to the effect that the United States Gypsum Company did decline to permit Ebsary and other licensees to sell board to the Cardiff Gypsum Company, and the purpose back of that suggestion was to avoid the necessity of introducing the thirty-five letters that Mr. Bromley stated were in the series then under discussion. I thought, Mr. Knuff, that you agreed that the stipulation would save putting in a considerable amount of this evidence.

Mr. Knuff: We did eliminate some last night, and I am not going to offer the ones that we have eliminated.

Justice Stephens: Very well. Thank you.

Where is Exhibit 528?

Mr. Knuff: That is a letter, dated September 28, 1939—

Justice Jackson: (Interposing) You mean September 18, 1939?

Mr. Knuff: No, if you will skip three, you will then come to the letter of September 28, 1939.

4277 I am sorry, I misunderstood Justice Jackson's question. Exhibit 528 is the letter dated September 18, 1939, to George N. Lenci from the Cardiff Gypsum Company.

I now ask that there be marked for identification as Government's Exhibit 529, a letter dated September 28, 1939, or rather a copy of a letter addressed to the United States Gypsum Company and signed George N. Lenci. That will be found by passing over the next three letters.

(The document referred to was marked as Government's Exhibit No. 529, for identification.)

Mr. Knuff: I also would like to have marked—

Justice Stephens: (Interposing) Let us have a chance to read this as they are presented. We must understand them all; otherwise, we cannot rule intelligently on them.

Proceed.

Mr. Bromley: May it please the Court, I don't understand the purpose of marking these letters, in view of the stipulation. For instance, this last one is just a request of United States Gypsum to grant permission to sell board to Cardiff. I have already agreed that we refused permission.

Mr. Knuff: The stipulation of Mr. Bromley in and of itself is colorless. He is stipulating to the obvious. If Mr. Bromley will stipulate that the refusal of USG to grant this consent was based upon the fact that the Car-
4278 diff Gypsum Company had a reputation as a price cutter, then we will not bother with any of these exhibits relating to Cardiff Gypsum Company. But as I say, the stipulation that Mr. Bromley gives, that his company refused to grant the consent, is in and of itself meaningless. We have to show the color and the meaning of what USG did by the exhibits that we are now offering.

Mr. Bromley: I won't stipulate that because I don't think it is the fact.

Justice Stephens: Well, apparently the Court has wasted time in its attempt to save time.

Proceed and introduce your exhibits.

Mr. Bromley: Could I, with the Court's permission, ask counsel with respect to Exhibit 528 whether he is making a part of that exhibit the enclosure which, in my copy at least, is annexed to the letter and referred to in the first paragraph of the letter? I don't understand whether he is including that, or not.

Mr. Knuff: We are.

Justice Stephens: Very well.

Justice Garrett: Is that enclosure the list of points?

Justice Stephens: Yes.

Justice Garrett: So that that then—

Justice Stephens: (Interposing)—has to be treated as part of Exhibit 528.

Mr. Knuff: We would like at this time to have
4279 marked for identification as Government's Exhibit 530, a letter, dated September 29, 1939, addressed to George Lenci and signed Cardiff Gypsum Company, M. Gutman.

(The document referred to was marked as Government's Exhibit No. 530, for identification.)

Mr. Knuff: We would like to have marked for identification as Government's Exhibit 531, a copy of a telegram

dated October 3, 1939, addressed to United States Gypsum Company and signed Ebsary Gypsum Company.

(The document referred to was marked as Government's Exhibit No. 531, for identification.)

Mr. Knuff: We would like to have marked for identification as Government's Exhibit 532, a letter, dated October 3, 1939, addressed to the Ebsary Gypsum Company and signed United States Gypsum Company, S. F. Bartlett.

(The document referred to was marked as Government's Exhibit No. 532, for identification.)

Mr. Knuff: In order to arrive at the next exhibit to be marked, just pass the next two pages.

I now ask that there be marked as Government's Exhibit 533 for identification, a memorandum dated October 7, 1939, signed F. W. Allen, Secretary.

4280 (The document referred to was marked as Government's Exhibit No. 533, for identification.)

Mr. Knuff: We would like to have marked for identification at this time as Government's Exhibit 534, a copy of a telegram, dated October 11, 1939, addressed to the United States Gypsum Company and signed Ebsary Gypsum Company.

(The document referred to was marked as Government's Exhibit No. 534, for identification.)

Mr. Knuff: We would also like to have marked for identification as Government's Exhibit 535, the original of a letter dated October 12, 1939, addressed to the Ebsary Gypsum Company and signed by the United States Gypsum Company, S. F. Bartlett.

(The document referred to was marked as Government's Exhibit No. 535, for identification.)

Mr. Knuff: We would also like to have marked for identification as Government's Exhibit 536, a copy of a letter dated October 13, 1939, addressed to the Cardiff Gypsum Company and signed Ebsary Gypsum Company.

(The document referred to was marked as Government's Exhibit No. 536, for identification.)

4281 Mr. Knuff: We would also like to have marked for identification as Government's Exhibit 537, a

letter dated October 14, 1939, addressed to George N. Lenci, and signed Cardiff Gypsum Company, M. Gutman.

(The document referred to was marked as Government's Exhibit No. 537, for identification.)

Mr. Knuff: We would also like to have marked for identification as Government's Exhibit 538, a copy of a letter dated October 16, 1939, addressed to Mr. S. F. Bartlett, and signed Ebsary Gypsum Company.

(The document referred to was marked Government's Exhibit No. 538, for identification.)

Mr. Knuff: We would like now to have marked for identification as Government's Exhibit 539, a copy of a letter dated October 16, 1939, addressed to the Cardiff Gypsum Company and signed Ebsary Gypsum Company, George N. Lenci, Vice President.

(The document referred to was marked as Government's Exhibit No. 539, for identification.)

Mr. Knuff: We would also like to have marked for identification as Government's Exhibit 540, a letter dated October 17, 1939, addressed to George N. Lenci, and
4282 signed M. Gutman, Cardiff Gypsum Company.

(The document referred to was marked as Government's Exhibit No. 540, for identification.)

Mr. Knuff: I would like to have marked for identification at this time as Government's Exhibit 541, a copy of a letter dated October 21, 1939, addressed to the Cardiff Gypsum Company, and signed Ebsary Gypsum Company.

(The document referred to was marked as Government's Exhibit No. 541, for identification.)

Mr. Knuff: I also would like to have marked for identification as Government's Exhibit 542, a telegram addressed to the Ebsary Gypsum Company, dated October 21, 1939, and signed United States Gypsum Company.

(The document referred to was marked as Government's Exhibit No. 542, for identification.)

Justice Stephens: We will take the morning recess at this time, gentlemen.

(Thereupon, a five-minute recess was taken, after which the trial was resumed.)

Justice Stephens: Proceed.

Mr. Knuff: I have just one more exhibit that I want to offer in connection with this Sensibar, or Cardiff.

4283 Gypsum Company, matter.

I ask that there be marked for identification as Government's Exhibit 543—and this will be found immediately following the letter of October 24, 1939, which I am omitting.—

Justice Jackson: (Interposing) It is a copy of a telegram?

Mr. Knuff: Yes, a copy of a telegram, your Honor, dated October 25, 1939, addressed to the Cardiff Gypsum Company and signed Ebsary Gypsum Company.

(The document referred to was marked as Government's Exhibit No. 543, for identification.)

Mr. Knuff: I assume, Mr. Bromley, that there is no question as to the identification of Government's Exhibits 523 to 543 for identification, inclusive?

Mr. Bromley: I don't know anything about them, about most of them.

Mr. Knuff: They were all introduced in the criminal trial; they were all marked as exhibits in the criminal trial, and were all received in the criminal trial.

Will you show Mr. Lenci Government's Exhibit 523 to 543, inclusive, please?

(Thereupon, Government's Exhibits Nos. 523 to 543, inclusive, for identification, were handed to the witness.)

4284 By Mr. Knuff:

Q. Mr. Lenci, will you examine those exhibits, Government's Exhibits 523 to 543, inclusive, and tell us whether or not those exhibits represent the correspondence, telegrams, and a memorandum that was prepared in your office, all of which were occasioned by the offer of Cardiff Gypsum Company to purchase board from the Ebsary Gypsum Company?

Justice Stephens: You might clarify your record, Mr. Knuff, if the Court may suggest, by asking the witness to answer this question, as to whether or not each one of the items which purports to have been sent by the Ebsary Gypsum Company to the Cardiff Gypsum Company was sent; whether each one of the items purporting to have been sent by the Cardiff Gypsum Company to Ebsary, was received by Ebsary; whether each one of the items pur-

porting to have been sent by Ebsary to United States Gypsum, was sent by Ebsary; and whether each one of the items purporting to have been sent by United States Gypsum to Ebsary was received—and then you will have to examine particularly—if he answers those questions in the affirmative—only on Exhibit 533, which does not explain itself.

Mr. Knuff: I will adopt your Honor's suggestion.

Justice Stephens: Thank you. Will you answer that question?

The Witness: I would say "yes" to your Honor's question.

By Mr. Knuff:

4285 Q. With reference to Government's Exhibit 533, will you state, Mr. Lenci, who Mr. F. W. Allen is? A. Mr. F. W. Allen is our Secretary, and he is also in charge of our Credit Department.

Q. And was this memorandum, Exhibit 533, a memorandum that was prepared by Mr. Allen concerning the credit of the Cardiff Gypsum Company? A. Yes.

Mr. Knuff: We now offer in evidence, if your Honor pleases, Government's Exhibits 523 to 543, inclusive.

Mr. Bromley: In addition to the usual objection which I make, the defendants object to these exhibits on the ground that they are immaterial to any charge contained in the complaint, and also immaterial in view of the stipulation made at page 4544 of the transcript.

Justice Stephens: The general objection as to immateriality is overruled.

What do you say as to the objection that they are immaterial in view of this stipulation, Mr. Knuff? The Court asks this question only in the interest of saving time. It does seem to the Court, Mr. Knuff, that all these letters prove is that Cardiff wanted to buy board from Ebsary, and that Ebsary wanted to sell board to Cardiff, and that Ebsary tried to get consent from USG, and failed.

Mr. Knuff: They prove the circumstances sur-
4286 rounding the asking of that consent from USG. In the first place, USG's consent was asked in late September, 1939, I believe. Numerous telegrams passed between Ebsary and the United States Gypsum Company in connection with that application for a consent. In addition to that, the letters indicate clearly that there was an unusual situation in this case, because as shown by Exhibit 540, the United States Gypsum Company not only didn't act according to the usual manner in which they had

heretofore acted, that is to pass upon applications rather promptly, but instead of that, they sent Mr. Bartlett and Mr. Spray, Cranston Spray, down to see Mr. Lenci, and Mr. Cranston Spray and Mr. Bartlett did contact Mr. Lenci, and Mr. Lenci asked Mr. Spray and Mr. Bartlett when the matter would be disposed of, and the reply was, I believe, that it would be taken care of shortly.

Now the usual procedure that the previous consents indicate, is that a manufacturer would ask permission of the licensor to sell a manufacturing distributor. In the course of possibly one, two or three days, that consent would be forthcoming. Here it took a matter of six weeks or over. In the meantime the investigation that USG was making was going on. The failure of USG to give their consent is absolutely meaningless without the background that highlights that consent.

That background is contained in Exhibits 523 to
4287 543, inclusive, coupled with other evidence that will follow.

For instance, the next exhibit will show that when Ebsary telegraphed the U. S. Gypsum Company for permission to sell the Structural Division of the American Cyanamid Company, on the same day that Ebsary sent that telegram the United States Gypsum Company answered that telegram and gave their consent.

Justice Jackson: I don't think that proves a thing at all, except that they were slow in one case, and fast in another, that is all.

Mr. Knuff: Well, as I say, we are going to try to develop from Mr. Lenci that sending Mr. Spray, a member of the Scott, MacLeish & Falk firm in Chicago, was certainly something unusual.

Justice Jackson: Oh, yes, and I think it is also unusual to grant credit to people who have gone through bankruptcy, which is what one of your exhibits shows. Naturally they wanted to make an investigation. But it is immaterial, as I see it, whether it was slow or fast. They eventually refused permission. You say that they had no right to do that, and Mr. Bromley says that they had. So that is all there is to that.

Mr. Knuff: Mr. Bromley says that they had a right to do that under the "single trader" doctrine—

Justice Jackson: (Interposing) That is a matter
4288 for argument later on.

Mr. Knuff: That is right. That is the reason we want these exhibits in now.

Justice Stephens: Well, they are received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

The Court of course does not wish to assume to control how counsel on either side of the case shall try their case, but we are so shorthanded with judges in this jurisdiction that it seems a pity to take days of time going into matters that seem obvious, especially in view of the stipulation which covers most of the things that are proved by the exhibits; but perhaps we would save time by not making any suggestions about saving time.

These exhibits are received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents marked as Government's Exhibits Nos. 523 to 543, inclusive, were received in evidence.)

By Mr. Knuff:

Q. Mr. Lenci, will you refer to Government's Exhibit—

Justice Stephens: (Interposing) Judge Garrett calls my attention to the fact that I should have stated that these were received in evidence consistently with the ruling on exhibits of a similar character offered yesterday.

4289

Mr. Knuff: There weren't any such rulings yesterday.

Justice Garrett: That is sufficient. I just do not agree with the ruling.

Justice Stephens: I am referring to the ruling in which Judge Jackson and myself indicated that this class of evidence was admissible under paragraph 45 (c) of the complaint, but not under 45 (e), to which Judge Garrett dissented, thinking it inadmissible at all. That is clear now, I think.

By Mr. Knuff:

Q. Mr. Lenci, will you refer to Government's Exhibit 540?

At or about that time did you have any conversation with Mr. Bartlett, and with Mr. Spray, concerning your application, or the application of the Ebsary Gypsum Company, for permission to sell board to the Cardiff Gypsum Company? A. I believe I did, because there is a memorandum to that effect on this Exhibit No. 540.

Q. Do you remember what the conversation was? A. Well, first of all—

Mr. Bromley: (Interposing) If he is going to state it, I object to it as immaterial.

The Witness: First of all—

Justice Stephens: (Interposing) Just a minute. When there is an objection made, don't answer until we get
4290 a chance to rule on it.

The Witness: I am sorry.

Justice Stephens: The objection is overruled.

By Mr. Knuff:

Q. Will you state, if you can remember, what the conversation was? A. What I was going to say was this. I have known Mr. Bartlett for thirty years, and it was his habit, when he was in New York, to drop in and have a little visit with me. I have known him since about 1907 or 1908—

Justice Stephens: (Interposing) Mr. Lenci, I don't want to stop you from stating anything that you think is necessary to make a complete answer to the question, but in your good will with reference to making this whole thing clear, you are sometimes taking an unnecessary amount of time. If you will just answer the question as to what that conversation was, then if counsel on either side of the case wish to bring out the habit of Mr. Bartlett to drop in on you, they can do so. If they don't think that is material or necessary, we can save that much time.

The Witness: I was trying to show that this visit was not specifically on this matter.

By Mr. Knuff:

Q. You did have a conversation with Mr. Bartlett
4291 and Mr. Spray? A. Yes.

Q. Will you tell us what the conversation was? A. The conversation regarding this was very short, to the effect that they had not had time to consider it, and that they were waiting for the Chicago office to pass on it, and as soon as they did, they would let me know.

Q. You had previously made an application to sell the Connecticut Adamant Plaster Company at New Haven, Connecticut, and the Atlantic Gypsum Company, had you not? A. Yes.

Q. Now in connection with those applications, did anyone from the United States Gypsum Company come around and talk to you about those applications? A. No.

Q. Or, as to any other application that you made for permission to sell, had the United States Gypsum Company,

on any other occasion, except this case, sent a representative around to see you? A. No.

Mr. O'Donnell: I object to that. I think the witness testified that the United States Gypsum Company did not send a representative there to talk to him on this matter, but that Mr. Bartlett just dropped in.

Justice Stephens: Read the last question and answer, and the objection by Mr. O'Donnell.

4292 (Thereupon, the reporter read the record as requested by the Court.)

Justice Stephens: I think that is a matter for cross-examination, Mr. O'Donnell. The objection is overruled.

By Mr. Knuff:

Q. Mr. Lenci, did you know the reputation of the Cardiff Gypsum Company in 1939 as to its price policies? A. No, I didn't.

Q. You say that you didn't know what its reputation was? A. No, we didn't operate in the same territory that they did, and we had no occasion to come in contact with them. They worked in the Middle West, and we worked in the East.

Q. At the criminal trial you were asked this question—

Mr. Bromley: (Interposing) What page is that?

Mr. Knuff: Page 618.

Mr. Bromley: I object to his reading from the record. If he wants to refresh his recollection, that is all right.

Justice Jackson: Maybe he is impeaching him, I don't know.

Mr. Knuff: I am going to use this for two purposes, first to refresh his recollection, and then to impeach his testimony.

Justice Jackson: Why not show it to him first, and see if his recollection is refreshed? After that, if you desire to impeach him, that is another thing.

(Thereupon, the transcript referred to was handed to the witness for examination.)

4293 Justice Stephens: Mr. Marshall, show it to defendants' counsel.

Mr. Knuff: I think they have a copy.

Justice Stephens: Thank you. Then show it to the Court, please.

(Thereupon, the transcript referred to was handed to the Court for examination.)

Justice Stephens: Very well, proceed.

By Mr. Knuff:

Q. Mr. Lenci, you have read the excerpt from your previous testimony before the court down here, given on October 20, 1941? A. Yes.

Q. Has your memory been refreshed by that? A. Yes.

Q. Now in 1939 did you know the reputation of the Cardiff Gypsum Company concerning its price policies?

Mr. Bromley: That calls for a "yes" or "no" answer, I assume.

Justice Stephens: Just answer that "yes" or "no".

The Witness: That is a hard question to answer "yes" or "no".

Justice Stephens: You can answer "yes" or "no" as to whether you knew the reputation of the Cardiff Gypsum Company with respect to its price policies.

4294 The Witness: Yes, I knew it.

Justice Stephens: Very well.

By Mr. Knuff:

Q. Will you state whether or not that company had a reputation as being a price cutter?

Mr. Bromley: I object to that as immaterial and incompetent because hearsay.

Mr. Knuff: Of course all testimony as to reputation is hearsay.

Justice Stephens: You are trying to prove his reputation as a price cutter, as a circumstance, whether true or not, bearing upon the action of the United States Gypsum Company in refusing permission to Ebsary to sell to the Cardiff Gypsum Company?

Mr. Knuff: Yes.

Justice Stephens: Do you intend to introduce additional evidence which will connect this with United States Gypsum Company's knowledge of this reputation?

Mr. Knuff: Here is a man that knows the reputation of that company—

Justice Stephens: (Interposing) I understand your theory of all of this evidence is to prove that the reason that USG refused its consent was because it thought Cardiff was a price cutter, is that right?

Mr. Knuff: We will bring that out—

4295 Justice Stephens: (Interposing) I am asking you—do you intend to add evidence which will connect this with USG's knowledge?

Mr. Knuff: Yes, your Honor.

Justice Stephens: Objection overruled.

Mr. Knuff: Will you read the question, Mr. Reporter?

(Thereupon, the pending question was read by the reporter.)

The Witness: Well, as I said, I had no direct information on it whatever, we never came in contact with them before this time, but through purely hearsay evidence I did know in the past that this company had had some reputation of that kind.

By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked for identification as Government's Exhibit 544, the same being a telegram, dated November 8, 1935.

(The document referred to was marked as Government's Exhibit No. 544, for identification.)

By Mr. Knuff:

Q. I also show you, Mr. Lenci, what has been marked for identification—

Justice Stephens: (Interposing) Just a moment, Mr. Knuff. I am sorry to interrupt you again but the Court wishes to be sure that its rulings are correct.

4296 Judge Jackson and I, who are in the majority with respect to the admissibility of this class of evidence, have some question as to whether your inquiries as to the reputation of Cardiff go to the item which you sought to prove, to-wit, plaster. I don't think your questions embraced anything about plaster.

Mr. Knuff: That is what they were selling.

Justice Stephens: Why don't you ask the witness what the reputation of this company was with reference to price cutting on plaster, rather than as to its general reputation?

By Mr. Knuff:

Q. Mr. Lenci, when you said that the Cardiff Gypsum Company had a reputation as a price cutter, did you mean that they had a reputation as a price cutter on plaster?

Mr. Bromley: I make the same objection as to materiality and competency.

Justice Stephens: Overruled.

The Witness: Yes.

Mr. Knuff: You see at this time, your Honor, Cardiff wasn't selling board at all.

Justice Stephens: I understand that, but we are trying to keep this record as succinct and clear as we can, and I understood that the entire theory of all of this evidence which we have let in, was that Cardiff had a reputa-
4297 tion for price cutting on plaster, and your questions didn't go to plaster.

Mr. Knuff: I accept your Honor's suggestion.

By Mr. Knuff:

Q. You have before you, Mr. Lenci, Government's Exhibit 544, which purports to be a telegram dated November 8, 1935, addressed to United States Gypsum Company and signed Ebsary Gypsum Company.

I also show you what has been marked for identification as Government's Exhibit 545, which likewise purports to be a copy of a telegraph dated November 8, 1935, addressed to the Ebsary Gypsum Company, and signed United States Gypsum Company.

(The document referred to was marked as Government's Exhibit No. 545, for identification.)

By Mr. Knuff:

Q. I now want to show you what has been marked as Government's Exhibit 546 for identification, which is a letter, dated November 8, 1935, addressed to the Ebsary Gypsum Company, and signed United States Gypsum Company, C. Henning, Vice President.

(The document referred to was marked as Government's Exhibit No. 546, for identification.)

By Mr. Knuff:

Q. Will you state, Mr. Lenci, if the exhibits which
4298 you have before you are copies of telegrams sent or received, as well as the original of a letter that you received from the United States Gypsum Company? A. We received the telegram which is marked Exhibit 544, and we also received the letter which is marked Exhibit 546.

Justice Stephens: You say you received the telegram marked 544?

The Witness: I beg your pardon, we sent the telegram marked 544, and received the letter marked 546.

By Mr. Knuff:

Q. And did you receive the telegram, a copy of which is marked for identification as Government's Exhibit 545? A. Yes.

Mr. Knuff: We now offer in evidence Government's Exhibits 544, 545, and 546.

Mr. Bromley: In addition to the usual objection, which I make, I object on the ground that they are immaterial to any issue in the case, and call attention to the fact that they are dated four years prior to the last series of Cardiff exhibits.

Justice Stephens: What do you say to that, Mr. Knuff? Doesn't that make them pretty remote if they were four years before the Cardiff episode?

Mr. Knuff: I don't think so, your Honor. They haven't any relation to Cardiff except to show how fast the
4299 United States Gypsum Company acted before this. In connection with that, I think it is quite significant. Maybe their weight is not very much, but I think they are entirely relevant.

Justice Stephens: Well, the objection is overruled; they are received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents marked as Government's Exhibits No. 544, 545 and 546, were received in evidence.)

Justice Stephens: The record may show, in the interests of saving time, Mr. Bromley, that you have a continuing objection to all of this class of testimony and evidence, although I do not foreclose you from raising special objections, as you see fit.

Mr. Bromley: Thank you, your Honor.

4300 By Mr. Knuff:

Q. Now, pursuant to the consent that was given you in 1935, you did sell board to the American Cyanamid Company, to their Structural Gypsum Division; is that correct? A. Yes.

Q. Did you know Mr. Bartlett of the United States Gypsum Company? A. Yes.

Q. In 1938 or in 1939, did Mr. Bartlett complain that the Structural was selling board and lath to dealers at prices that were below the minimum prices specified by USG for its licensees? A. He made an inquiry of that kind at one time. I can't place the date.

Q. Would you say it was in the year 1939, or 1938? A. It was in the latter part of the 1930's.

Q. And pursuant to that did he tell you what to do? A. I think he asked me to investigate—

Q. (Interposing) He asked you to investigate and see

whether that was correct or not; is that it? A. I believe so, yes.

Q. And where did this conversation take place, in your office in New York City, that is, the conversation that you had with Mr. Bartlett? A. It was in New York. I
4301 don't remember whether it was in person or whether it was a telephone conversation, I don't remember as to that.

Q. Did you investigate and make inquiry from Structural Gypsum Company as to whether or not Structural was selling below the minimum prices specified by USG for its licensees? A. I asked Mr. McCormick, as I recall it.

Q. When you say you "asked Mr. McCormick", do you mean that you asked him personally, or do you mean that you called him on the telephone? A. I think it was a telephone conversation.

Q. And Mr. McCormick was who? A. He was in charge of sales for the Structural Division of the American Cyanamid Company.

Q. And what did Mr. McCormick tell you, if anything? A. As I recall it, he told me that they were not selling below the board prices which were in effect at that time.

Q. Did you ask Mr. McCormick as to what his future policy would be? A. I don't think so.

Q. Now after Mr. McCormick told you that they were not selling below the prices, did you communicate that information to Mr. Bartlett? A. I don't remember.

Q. Do you recall whether you called Mr. Bartlett
4302 on the telephone? A. I don't remember, at the present time.

Q. Could your memory be refreshed as to that? A. It could be yes.

Q. I want to show you, Mr. Lenci, the testimony that you gave before the Court in the District of Columbia on the 20th day of October, 1941, at page 570, beginning with line 13, and ending with line 4 on page 571.

(Testimony referred to handed to the witness for examination; then handed to the Court for examination.)

By Mr. Knuff:

Q. Since reading that testimony, Mr. Lenci, has your recollection been refreshed? A. Yes, it has.

Q. And can you state now that you did communicate the results of your talk with Mr. McCormick, to Mr. Bartlett—is that correct? A. Yes, I did.

Q. Now that is one conversation that you had with Mr. Bartlett in the latter 1930's, as you said. Did you have a second conversation with Mr. Bartlett where Mr. Bartlett complained that Structural was likewise selling board and lath to dealers at prices that were below the minimum prices specified by USG for its licensees? A. An-
4303 other conversation separate from this one?

Q. About four months apart. A. I don't remember but one. There might have been two, but I don't remember any other.

Q. I would like to show you, Mr. Lenci, the testimony that you gave before the Grand Jury on April 22, 1940, at page 370, and I will ask you to read from the bottom of page 370, where I have indicated with a pencil mark, down to page 371 where I have likewise indicated with a pencil mark.

(Testimony referred to handed to the witness for examination; then handed to the Court for examination; then handed to Mr. Bromley for examination.)

By Mr. Knuff:

Q. Mr. Lenci, I wonder if, by chance, your recollection has been refreshed as to whether you had more than one conversation with Mr. Bartlett, or a representative of the USG, wherein they complained that the Structural was selling board and lath to dealers at prices that were below the minimum prices specified by USG for its licensees? A. I am sorry, but at the present time I really can't recollect any other time.

Q. Do you recall, Mr. Lenci, that at that time, Structural Gypsum had a salesman employed by the name of
4304 Stremble? A. Yes.

Q. And do you know how he was paid by Structural? A. Well, I learned that he was a commission salesman.

Q. He was paid on a commission basis? A. Yes.

Q. Did you ever complain to Mr. McCormick concerning Mr. Stremble's employment, and ask Mr. McCormick to have Mr. Stremble withdrawn as a commission salesman or do something else about it? A. I know that I complained about him. I don't know that I told him what to do with him, but I did complain about Mr. Stremble's practices.

Q. Can you tell us what you told Mr. McCormick? A. You see, at that time we were selling the Structural Divi-

sion our gypsum board and lath, and this Mr. Stremble was located in Brooklyn and Long Island, and at the same time we had our own salesmen in that same territory, and we were selling our material to Structural and Stremble was selling our material to our own dealers and rebating to them, and I complained about that.

Q. Can you fix the time when this occurred, approximately? A. I would say in 1938 or 1939.

4305 Q. And did Mr. McCormick communicate further with you as to what happened to Mr. Stremble? A. Yes, he had a talk with Stremble and Stremble admitted that he was giving cash rebates.

Q. And did Mr. McCormick subsequently call you and tell you that? A. He told me that, yes.

Q. And did he further tell you that he had discharged Mr. Stremble? A. Yes.

Q. I show you what has been marked for Identification as Government's Exhibit 547, the same being a letter dated August 20, 1934, addressed to George N. Lenci and signed C. Henning.

(The document referred to was marked Government's Exhibit No. 547 for Identification.)

By Mr. Knuff:

Q. Did you receive that communication, Mr. Lenci? A. Yes.

Q. Do you recall when the Ebsary Gypsum Company signed the foil board agreement? A. It is my recollection, subject to correction, that it was in the latter part of 1935.

Q. I think it is in evidence, Mr. Lenci, that the
4306 metallized or foil board agreement which the Ebsary Gypsum Company signed was dated August 14, 1935. A. Yes.

Q. Now prior to the time that you signed this foil board agreement, did you purchase foil board, or metallized lath, from any other companies—and I particularly refer to the National Gypsum Company? A. To the best of my recollection, we bought possibly 3 or 4 carloads.

Q. And did you buy from any company other than the Ebsary Gypsum Company? Did you buy from the USG— A. (Interposing) Other than National, you mean?

Q. Yes, other than National, I beg your pardon. Did you buy from USG? A. No, I don't think we did.

Q. When did you start to manufacture foil board, Mr. Lenci? A. Right at the beginning of the year following. That would be 1936.

Q. In 1936? A. Yes.

Q. Now, Mr. Lenci, at what prices did you sell the board that you purchased from the National Gypsum Company? A. Well, I have no record of that, at the present time,—here, rather.

4307 Q. Well, did you sell the board for more or for less than the price specified by USG in its license bulletins?

Mr. Bromley: I object to that on the ground that he says he doesn't know, and it is repetitious.

Mr. Knuff: I am asking if he sold it for more or less.

Justice Stephens: Do you know whether you sold it for more or less?

The Witness: No; I don't know, even, if we had received the USG bulletins at that time.

Justice Stephens: Then the objection is sustained, if he doesn't know.

By Mr. Knuff:

Q. Could your memory be refreshed as to the prices on that? A. It might be.

Q. I would like to have you refer to a letter, that may subsequently be offered in evidence—it is not now marked for identification—but it is a letter dated March 16, 1935. Will you please look at that letter and see whether or not your recollection could be refreshed as to what prices this board, this foil board, was sold at? A. No, I am sorry, that wouldn't help me. This only gives—

Mr. Bromley: (Interposing) I object to his stating—

4308 The Witness: (Interposing and continuing)—the selling price to us.

Justice Stephens: Don't state what it says; if it doesn't refresh your recollection, that is enough.

Mr. Bromley: May the witness' answer be stricken in so far as it gives the contents, or purports to, of the letter?

Justice Stephens: It may go out.

The Court will take the noon recess.

(Thereupon, at 12:15 o'clock p. m., a recess was taken until 1:45 o'clock p. m., of the same day.)

4309 AFTERNOON SESSION

(The trial was resumed at 1:45 o'clock p. m., pursuant to recess.)

Justice Stephens: You may proceed, gentlemen.

Mr. Steffen: Your Honor, I should like to make a brief statement in regard to the Gloyd deposition—

Justice Stephens: (Interposing) I have just returned to you the papers.

Mr. Knuff: Yes, we have them.

Mr. Steffen: We have examined the letters which Mr. Johnston gave us yesterday, concerning the doctors' reports of Mr. Gloyd's condition, and I want to make one or two statements concerning them.

I may say at the outset that we are a little bit surprised that the first one of these letters, being dated January 8, was not turned over to us at that time; and, secondly, the letters of February 18th we did not see until just yesterday.

At the time of the second investigation, or second examination of Mr. Gloyd, if we had had any opportunity at all we would, of course, have had a physican present so that we could have made some sort of a free examination as to his condition. I would say it seems to me that that is shooting from ambush, as Mr. Johnston says, to give us no information at all concerning either the original letter
4310 until just now, or the second examination of Mr. Gloyd's condition.

Now on the matter of Mr. Gloyd's condition, we want to assure the Court that we have no desire whatever to imperil his health, and I think I should say that if we were to take his deposition we would use every effort to save him from any excitement or grueling examination.

I will say that I think these doctors' examinations have probably been more grueling and have taken more time than anything we would do. Mr. Knuff has a very nice bedside manner, and will ask these questions politely and take such time and give him such time as is necessary for the answers.

I want to point out that in these letters, no one said that a deposition, as such, is not to be taken. They say if it is grueling or if it is to be under excitement, and things of that sort; and the doctors don't know what the nature of the examination is going to be. Therefore, they couldn't say that he could not withstand a deposition.

I want to say that one doctor, who we think ranks highest among these doctors, is Dr. Langston, who is a heart specialist, and his opinion is rather clear that the man is 79 years old, that he is, of course, having a failing memory in some degree, but that if the examination was conducted

decently and in an orderly manner. he could un-
4311 doubtedly answer the questions put to him, giving him necessary rest periods and what-not.

So that, on the evidence that Mr. Johnston submits, it seems to us right there that there is no clear showing that we shouldn't be permitted to take the deposition.

The statement as to failing memory, I notice that each of the doctors explain that his memory on recent events is poor. We don't want recent events. If we can get one witness that can tell us what happened in '25, '26, '27, '28, and '29, we will be very glad.

Justice Jackson: Was Mr. Chism connected with the company then?

Mr. Steffen: That is right.

Justice Jackson: During those years?

Mr. Steffen: Yes.

Justice Jackson: Why can't you get all the information from him that you could from Mr. Gloyd?

Mr. Steffen: Because he didn't handle some of the transactions directly with the USG officials. Our thought on this is that we can save time for the Court. I want to assure you that we would like to finish in two more weeks, and I would like to get this deposition in, in the interim, during the vacation—that is, the one of Mr. Gloyd and the one of Mr. Chism. We can handle them both if we go to Oklahoma City and take them.

4312 Justice Jackson: Couldn't you get the same result with written interrogatories?

Mr. Steffen: Frankly, I would say no. I think written interrogatories are the most hopeless way of getting information that is possible, particularly with a man that perhaps has a failing memory and we might have to prompt, one way or the other.

You will notice that he is a defendant, and we can ask leading questions, and we would like to have the opportunity to prompt and refresh him as the examination would proceed. And written interrogatories simply wouldn't work along that line,—he would say, "I don't remember", and that is all there would be to it. We couldn't say, "We would like to show you such-and-such a paper, and from that does that not refresh your recollection that this happened"—with the idea that we would get the information that we need from a deposition, and I don't see how it is possible under any other basis.

His testimony, I think, is essential to our case, particularly as it pertains to the Texas Company.

I am making that statement simply to indicate that our present disposition is to ask that we be permitted to take the deposition. If Mr. Johnston wants to move to have our motion for a deposition quashed, that is his privilege.

Justice Stephens: Do you wish to be heard, Mr. Johnston?

4313 Mr. Johnston: If the Court please, I will prepare and file a motion so that it can come before the Court.

I had hoped, and still hope, that in considering this motion these letters might be kept out of the record.

Justice Stephens: I don't see how that is possible, Mr. Johnston. The Government has a right to apply for the taking of the deposition. If you want to object to it, you will have to file a motion supported by the usual affidavits and evidentiary matters upon which the motion is based. They may not have to go into the transcript of testimony, but I don't see how they can be kept out of the formal records of the Court. I have read them all, as you kindly submitted them to me, and so have my colleagues read them. There is nothing in them discreditable to Mr. Gloyd at all.

Mr. Johnston: May I say a word off the record?

Justice Stephens: Yes.

(Discussion off the record.)

Justice Stephens: You may proceed, Mr. Knuff.

Thereupon, GEORGE N. LENCI the witness on the stand at the time of recess, resumed his testimony as follows:

Direct Examination (resumed)

Mr. Knuff: May it please the Court, yesterday I inadvertently led Mr. Lenci into making an erro-

4314 neous statement that I had not the intention of leading him to make, and I know that Mr. Lenci didn't have the intention to give the answer which he did, and I would like to correct that.

This is on page 4504, Your Honor. Justice Stephens called my attention to it this morning.

Justice Stephens: Yes.

Mr. Knuff: I don't think this needs to be taken for the record, because I am just going to read the questions and answers of the witness to bring back his recollection.

(Discussion off the record, in which Mr. Knuff read certain questions and answers to the witness from the testimony on February 21, 1944.)

By Mr. Knuff:

Q. Do you recall that testimony? A. Yes.

Q. Now as a matter of fact, at that time, of course, Ebsary was not delivering—

Justice Stephens: (Interposing) This isn't going to correct the record, Mr. Knuff, since you didn't have the record show your last few questions in the reading of this. The only way you can correct the record now is to call the attention of the witness, of record, to pages 4504 and 4505 of the transcript.

Mr. Knuff: I think that is correct.

By Mr. Knuff:

4315 Q. Mr. Lenci, I have read to you from your testimony appearing on page 4504 of the transcript beginning with line 14, and extending over to page 4505, line 12.

As a matter of fact, Ebsary was not selling anything to the Paragon Plaster & Supply or to Oakfield or to any of those companies at that time; isn't that correct? A. That is correct.

Q. And when you used the word "Ebsary", you meant to use that as an illustration? A. Yes.

Q. So that what you meant by that was that as to any company who was selling Paragon or those companies, the delivery should be made by that selling company to the Oakfield Gypsum Products Company? A. To them at their plant, that is correct, yes.

Mr. Bromley: I don't think that clears it up. The last answer—"to them"—I don't know who "them" means.

Justice Stephens: Who did you mean by "them"?

The Witness: To the Oakfield Gypsum Products Company at the Oakfield Gypsum Products Company's plant in Oakfield, New York.

Justice Jackson: Does that clear that to you, Mr. Bromley?

Mr. Bromley: No, sir.

Mr. Knuff: Well, let's see if we can clear it up, 4316 then.

By Mr. Knuff:

Q. In 1932, or in 1933, Ebsary was not selling either to Oakfield Gypsum Products Company, nor were they selling

to the American Hardwall Plaster Company, the Paragon Plaster Company, or the Paragon Plaster & Supply Company, were they? A. We were not.

Q. But you did make a complaint on April 27, 1933, to the effect that when any company, any manufacturing company which manufactured gypsum wallboard, sold board to the American Hardwall Plaster Company and the two Paragon companies, your complaint was that that company should deliver the board to Oakfield; is that correct? A. Yes.

Q. And when you said yesterday that Ebsary should deliver the board to Oakfield, you meant by the term "Ebsary" any other company which was supplying board to either Oakfield, the American Hardwall Plaster, the Paragon Plaster, or the Paragon Plaster & Supply Company; is that correct? A. Yes, I was just using the name "Ebsary" as an illustration.

Mr. Knuff: Now that is clear to me. I don't know if it is clear to everyone else here.

Justice Jackson: I understand what he said.

Mr. Bromley: I don't want to have my silence
4317 taken as agreement that it is clear, and I will try to have another go at it on cross-examination.

Mr. Knuff: In the list of photostats that Your Honors have before you, the last exhibit that we had identified and offered, I believe, was Exhibit 547, which is a letter dated August 20, 1934.

The next exhibit, which will be 548, appears following the next two photostats, and it is a letter dated April 1, 1935, addressed to George Lenci and signed National Gypsum Company, R.F.B., Vice President. I will ask that it be marked for Identification as Government's Exhibit 548.

(The document referred to was marked as Government's Exhibit No. 548 for Identification.)

By Mr. Knuff:

Q. I will ask you, Mr. Lenci, if Government's Exhibit 548 was received by the Ebsary Gypsum Company? A. Yes.

Mr. Knuff: I offer in evidence Government's Exhibit 548 and the attachment attached thereto.

Justice Stephens: Mr. Burley was with National, was he?

Mr. Knuff: Yes, Your Honor.

Mr. Bromley: May I see the exhibit? We do not seem to have a copy of the enclosure.

4318 (Exhibit 548 handed to Mr. Bromley.)

Mr. Bromley: We make the usual objection.

Justice Stephens: Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 548, was received in evidence.)

Justice Garrett: Just a moment, please. The letter of April 1, 1935, is Government's Exhibit 548?

Mr. Knuff: Yes.

Justice Garrett: Is the attachment Exhibit 548-A, or what?

Mr. Knuff: It doesn't have any number at all, and possibly the attachment should be numbered 548-A. I thought not, I thought it should be just attached to 548.

Justice Stephens: Has Exhibit 547 been acted upon?

Mr. Knuff: I was under the impression that it had been.

Justice Stephens: How about it, Mrs. Gillette?

Mrs. Gillette: I have no record of it.

Justice Stephens: I think there are a half a dozen exhibits not yet acted upon.

What do your records show?

Mrs. Gillette: Exhibit 546 was received.

Mr. Knuff: I would like to have Government's
4319 Exhibit 548, with the attachment, as one exhibit, but if the Court has any objection to it—

Justice Stephens: (Interposing) Do as you see fit about it.

Mr. Knuff: We also offer in evidence Government's Exhibit 547.

Mr. Bromley: We make the usual objection.

Justice Stephens: Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 547, was received in evidence.)

By Mr. Knuff:

Q. Mr. Lenci, up until the time your company signed the foil board agreement, which was in August, 1935, were you able to purchase foil board at a manufacturer's discount?

Mr. Bromley: I object to that as incompetent because calling for a conclusion.

Justice Stephens: Yes, that objection is well taken. You should ask him to state at what price he did purchase it, if he knows, and the Court will conclude whether it was at a manufacturer's discount under the terms of the bulletins.

4320 By Mr. Knuff:

Q. Did you buy board, Mr. Lenci, from the National Gypsum Company, foil board? A. We did buy a small quantity from them.

Q. And did you get a discount from the purchase price of that board? A. It is my recollection we got it on some of those purchases.

Q. I mean at the beginning, were you able to buy it at a discount? A. No, by referring to this—may I refer to this?

Q. Yes. A. By referring to the copy of the letter attached to Exhibit 548, I would say we did not get a discount in the beginning.

Q. And later, after the agreement was signed, you were able to get the manufacturer's discount; is that correct? A. I believe so, I am not certain. I don't remember just when it became effective.

Q. Well, let's see if we can refresh your recollection, Mr. Lenci, on that.

I want to show you a letter dated October 8, 1935.

Mr. Knuff: That is in Your Honor's sets of exhibits, being the fourth item following Government's Exhibit 548.

4321 By Mr. Knuff:

Q. I want you to read the pencilled notation which that letter bears, and see if your recollection is refreshed, Mr. Lenci? A. Yes.

Q. And what is your answer to the question now, as to whether or not you were able to get the discount only after the foil board license was signed? A. My answer would be that prior to the time we signed the license, we had to pay the full dealer's price.

Q. And after you signed it, you were able to get the discount? A. I believe we were, yes, sir.

Mr. Knuff: Counting the letter of October 8 as the first letter, if you will leaf forward 8 letters you will come to the next exhibit, which will be Government's Exhibit 549, and

which is a letter dated December 28, 1934. I ask that it be marked for Identification as Government's Exhibit 549.

(The document referred to was marked as Government's Exhibit No. 549 for Identification.)

By Mr. Knuff:

Q. Mr. Lenci, I want to show you Government's Exhibit 549, which is a letter dated December 28, 1934, ad-
4322 dressed to George N. Lenci and signed E. W. Carey, Executive Secretary.

Will you state whether or not that letter was received at the office of the Ebsary Gypsum Company? A. Yes.

Mr. Knuff: Mr. Bromley, will you admit that that is Mr. E. W. Carey's signature?

Mr. Bromley: No; that did not come from our files, did it?

Mr. Knuff: No, that came from the Ebsary Gypsum Company's files.

Mr. Bromley: I don't know anything about it.

By Mr. Knuff:

Q. Do you know Mr. Carey's signature? A. Not very well, no, I am sorry.

Q. Was that letter received in the usual course of business? A. I believe so, it has our "Received" stamp on it.

Mr. Knuff: We offer in evidence Government's Exhibit No. 549.

Mr. Bromley: We make only the usual objection.

Justice Stephens: Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Govern-
4323 ment's Exhibit No. 549, was received in evidence.)

Justice Jackson: Does that include the list which follows?

Mr. Knuff: Yes, Your Honor.

Justice Jackson: Then that exhibit consists of three pages?

Mr. Knuff: Yes, it consists of three pages.

Justice Stephens: Proceed.

Mr. Knuff: The next exhibit, if Your Honors please, is Exhibit No. 550, which is a letter dated December 28, 1934, addressed to Mr. Arthur R. Black, and signed E. W. Carey.

I ask that it be so marked for Identification as Government's Exhibit No. 550.

(The document referred to was marked as Government's Exhibit No. 550 for Identification.)

Mr. Knuff: I now ask that there be marked for Identification as Exhibit 551—

Justice Stephens: (Interposing) Has Exhibit 550 an attachment?

Mr. Knuff: Exhibit 550 is the identical letter, in so far as the substance of the letter is concerned, as Exhibit 549, but it is addressed to Mr. Black.

4324 Justice Stephens: But do you include in the exhibit the attachment?

Mr. Knuff: We do, Your Honor.

Justice Jackson: Then let the record show that Exhibit 550 consists of three pages.

Mr. Knuff: Yes.

I would like to have marked for Identification Government's Exhibit 551, consisting of three pages, being a letter dated December 28, 1934, addressed to Mr. F. G. Krumholtz, Treasurer, and signed E. W. Carey.

(The document referred to was marked as Government's Exhibit No. 551 for Identification.)

Mr. Knuff: I would like to have marked for Identification as Government's Exhibit 552, a one-page letter, dated December 28, 1934, addressed to Mr. M. H. Baker and signed E. W. Carey, Executive Secretary.

(The document referred to was marked as Government's Exhibit No. 552 for Identification.)

Mr. Knuff: I now offer in evidence Government's Exhibits 550, 551 and 552.

Justice Stephens: What is the last one received, Mrs. Gillette?

Mrs. Gillette: Exhibit 549.

4325 Mr. Bromley: We make the usual objection; and in addition, we object because they are incompetent, on the ground that there is no identification.

Justice Stephens: Exhibits 550, 551 and 552 have not yet been identified. There is no testimony that this is the signature of Mr. Carey. Exhibit 552 is addressed to Baker of National Gypsum Company; 551 to Krumholtz of Universal; and 550 to Black of American—

Mr. Knuff: (Interposing) In connection with Government's Exhibits 550 to 552, inclusive, I think the exhibits identify themselves. Government's Exhibit 549 was offered in evidence and was received, subject to the usual objection. If you will note Government's Exhibit 549 and compare it with Government's Exhibit 550, they are identical, word for word. Government's Exhibit 550 was obtained by us, under subpoena, from the files of the American Gypsum Company, and as I say, it is word for word, signature and everything else, identical with Government's Exhibit 549.

The same is true as to Government's Exhibit 551. It is likewise identical, word for word, with Government's Exhibit 549.

Exhibit 552 is identical, word for word, with Government's Exhibit 549. Government's Exhibit 552 differs from Government's Exhibits 550 and 551 only to the extent that in 552 we do not have the attachments that
4326 were attached to Government's Exhibits 550 and 551. Otherwise, it is identical with 549.

Justice Stephens: What are you offering to prove by them, that they were received by Mr. Black and by Mr. Krumholtz, and by Mr. Baker?

Mr. Knuff: We are offering them to prove that they were sent by the Board Survey Company to the persons mentioned in the letters themselves, and came from their files.

Justice Stephens: Let me make an inquiry. American is in the background of Certain-teed. Who is speaking for Certain-teed here today? Is there anyone representing Mr. Adams?

Mr. Knuff: American is in the background of Celotex, if I may correct you.

Justice Stephens: That is right, I was looking at the American Cement Plaster. I misspoke myself.

What do you say to that, Mr. Oliver, concerning Celotex? Are you in a position to admit that Exhibit 550 was received by American?

Mr. Oliver: No, Your Honor.

Justice Stephens: You are not?

Mr. Oliver: No.

Justice Stephens: Are you in a position to admit that it was taken from the files of American or of Celotex?

Mr. Oliver: I don't know that. They were taken
4327 long before I had anything to do with the case.

Justice Stephens: What about National? Mr. Finck, what about this letter to Mr. Krumholtz?

Mr. Finck: I am only in a position to state that that did come from the files of the National Gypsum Company.

And also, the letter addressed to Universal, I believe, came from our files. No, it did not, I am sorry.

Justice Stephens: No, that wouldn't be likely.

How about 552, Mr. Finck, addressed to Mr. Baker?

Mr. Finck: That is the one I was speaking about. That came from the files of the National Gypsum Company.

Justice Stephens: I was asking you about 551, addressed to Krumholtz.

Mr. Finck: That did not come from our files.

Mr. Knuff: We got that from the files of National. It came from the files of National on May 3, 1940. It was in Container Box No. 12. It was Item No. 20, and it was taken out by Mr. Wise.

Justice Stephens: Let's pass on these one at a time.

The first one is Exhibit 550. Mr. Oliver, for Celotex, refuses to concede that this was received by or that it was found in the files of American Gypsum Company, and there is no identification of the signature as that of E. W. Carey, and therefore no proof that it was sent or received, or who it was sent or received by.

4328 I don't see how you expect the Court to pronounce that identified.

Mr. Knuff: Whether it was sent or received makes no difference. It is still a declaration of the person who wrote it.

Justice Stephens: But it isn't proved that it was written by Mr. Carey. There is no evidence before the Court to that effect.

Mr. Knuff: There is no question as to Mr. Carey's signature on the previous document, Exhibit 549.

Justice Stephens: You are asking the Court to sit as handwriting experts and making witnesses out of the Judges. You can't do that. You will have to identify it.

Isn't Mr. Carey living, or is he not?

Mr. Bromley: Yes, he is, and is under subpoena. He has been here for days and days.

Mr. Knuff: He has not been here under subpoena for days and days at all.

Justice Stephens: Let's not have any acrimonious debate. We can make our affirmances and denials in a temperate way. Is he under subpoena?

Mr. Knuff: He is under subpoena, but he is not here under subpoena.

Justice Stephens: Is he in the court room?

Mr. Bromley: Not now.

4329 Justice Stephens: Is he in the city?

Mr. Bromley: Not now.

Justice Stephens: If he is under subpoena, he can be obtained, undoubtedly, and these things can be put in in the regular way. There certainly is no identification as to Exhibit 550. The objection to that is sustained.

Now as to Exhibit 551, that, you say, you are not prepared to admit, Mr. Finck, was taken from the files of Universal?

Mr. Fink: There is nothing on the letter to indicate that it came from our files, but if Mr. Knuff says that we sent it to them, I will agree to that.

Justice Stephens: We are of the view that none of these three exhibits are identified, 550, 551 and 552. You can call Mr. Carey to identify the signatures and testify, if he can, that they were sent out as they purport to have been sent out. You may re-offer them when they are properly identified.

By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked for Identification as Government's Exhibit 553, the same being a letter dated December 31, 1934, addressed to George N. Lenci, and signed E. W. Carey, Executive Secretary.

Will you state whether or not that letter was received at the office of the Ebsary Gypsum Company? A.

4330 Yes.

(The document referred to was marked as Government's Exhibit No. 553 for Identification.)

Mr. Knuff: I would like to have marked for Identification as Government's Exhibit 554, a letter dated December 31, 1934, addressed to Mr. Arthur R. Black and signed Board Survey Company, E. W. Carey, Secretary.

(The document referred to was marked as Government's Exhibit No. 554 for Identification.)

Mr. Knuff: I am not unmindful of Your Honors' former ruling, but in order to get this on the record and to keep the numbering consecutive, I now offer in evidence Government's Exhibits 553 and 554.

Justice Stephens: Is there any objection to Exhibit 553 except the usual objection?

Mr. Bromley: No, sir.

Justice Stephens: Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 553, was received in evidence.)

Justice Stephens: Do you object to Exhibit No. 554?

4331 Mr. Bromley: Yes, sir, as incompetent, and the usual objection.

Justice Stephens: The objection is sustained on the ground that it is not yet identified. It may be re-offered if it can be identified. Let me read it, Mr. Knuff.

Mr. Knuff: It is the same as Exhibit 553, Your Honor.

Justice Stephens: You may proceed.

By Mr. Knuff:

Q. I show you, Mr. Lenci, what has been marked for Identification as Government's Exhibit 555, the same being a letter dated December 31, 1934, addressed to George N. Lenci, and signed E. W. Carey, Executive Secretary.

(The document referred to was marked as Government's Exhibit No. 555 for Identification.)

By Mr. Knuff:

Q. Was that letter received in the office of the Ebsary Gypsum Company? A. Yes.

Justice Jackson: Are you offering that?

Mr. Knuff: I am going to offer 555, 556, and some more, later on.

Justice Jackson: All right.

Mr. Knuff: I would like to have marked for Identification as Government's Exhibit 556, a letter dated De-

4332 cember 31, 1934, addressed to Mr. Arthur R. Black, and signed E. W. Carey, Executive Secretary.

(The document referred to was marked as Government's Exhibit No. 556 for Identification.)

Mr. Knuff: I would also like to have marked for Identification as Government's Exhibit 557, a letter dated December 31, 1934, addressed to R. F. Burley, and signed E. W. Carey, Exhibit 557 has attached to it a carbon of a reply, dated January 5, 1935, addressed to Mr. E. W. Carey and signed National Gypsum Company, Vice President.

(The document referred to was marked as Government's Exhibit No. 557 for Identification.)

Mr. Knuff: I would like at this time to offer Government's Exhibits 555, 556, and 557.

Mr. Bromley: We make the usual objection to Exhibit 555.

Justice Stephens: Exhibit 555 is received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 555, was received in evidence.)

Mr. Bromley: With respect to Exhibits 556 and
4333 557, we make the usual objection, and also object on the ground that they are incompetent because not identified.

Justice Stephens: The objection with respect to incompetency is sustained. The exhibits may be re-offered if they can be identified.

Mr. Knuff: If Your Honors will please turn over five photostats, you will come to a letter dated May 10, 1935, which is a letter addressed to George N. Lenci and signed Board Survey Company, E. W. Ca[illegible] Secretary. I will ask that that be marked for Identifica[illegible] as Government's Exhibit 558.

(The document referred to was marked as Government's Exhibit No. 558 for Identification.)

By Mr. Knuff:

Q. Mr. Lenci, was that letter received in the office of the Ebsary Gypsum Company, and did it come from the Ebsary Gypsum Company's files? A. Well, it is a copy of a letter, and, there isn't anything to show that we did receive it. There is no identifying stamp on it.

Mr. Knuff: I don't know whether the Court would take my word for it or not, but I can say that according to the system that we use in the Department, the markings we use in the Department, that letter was received from
4334 the Ebsary Gypsum Company, and came from their files. That is evidenced by the reverse side of the letter, where it is marked "E-9". That indicates to us that it came from the Ebsary Gypsum Company's files, and it was in the 9th container.

I don't know whether that will be satisfactory to the attorneys for the defense or not.

Justice Stephens: The Court has no question, of course, about your word, Mr. Knuff, but we can all be mistaken,

and if there is a dispute about it the Court has to rule upon it on the basis of the dispute.

Are you still in the state of mind of not knowing whether that came from your files or not?

The Witness: I didn't have a chance to read the letter itself. I just looked for the identification marks.

Justice Stephens: Read it.

(Exhibit examined by the witness.)

By Mr. Knuff:

Q. Would you say, Mr. Lenci, in view of what I have told you, that that was received from your company—

Justice Stephens: (Interposing) By your company, you mean?

Mr. Knuff: It was received by us from his company.

By Mr. Knuff:

Q. (Continuing) —that that was received from
4335 the Ebsary Gypsum Company's files? A. I really don't remember the letter itself, but I am willing to take your statement that it did come from our files.

Mr. Knuff: We offer in evidence Government's Exhibit 558.

Mr. Bromley: We make the usual objection.

Justice Stephens: Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 558, was received in evidence.)

By Mr. Knuff:

Q. Mr. Lenci, I want to direct your attention now to some practices that were probably governed by the license bulletins, and in particular I want to inquire as to what was the practice of the Ebsary Gypsum Company.

When you sell a truckload of board f.o.b. dealer's warehouse at the minimum price, do you hire the dealer's truck to haul the board from your mill? A. No, we do not.

Q. Do you know what the practice of other companies is under the same situation? A. Only just by observation.

Q. Do the other companies have the same practice?

4336 Mr. Bromley: I object to that as incompetent because based on hearsay and calling for a conclusion.

Mr. Knuff: He said "by observation".

Justice Jackson: I am wondering how many of the other companies' activities he observed?

Justice Stephens: What do you mean by saying you knew it "by observation"?

The Witness: Well, the biggest trucking area is the metropolitan New York area, and I have seen trucks delivering products of the other manufacturers.

Justice Jackson: All of the other manufacturers?

The Witness: The two principal competitors, in fact three of our competitors.

Justice Stephens: If you have seen it personally, you can tell about it.

The Witness: Yes.

By Mr. Knuff:

Q. Do they have the same practice? A. Yes, they all contract with the trucking companies.

Q. Was that practice o ours based upon any provision in the license bulletins of USG? A. No.

Q. Well, now, suppose we take a look at Government's Exhibit 37, and look at page 531.

(Government's Exhibit 37 handed to Witness.)

4337 By Mr. Knuff:

Q. It is the last paragraph on the page, under "Rebates", and at about the 6th line down.

Mr. Lenci, will you look at that bulletin and see if you care to change your answer? A. No.

Justice Stephens: Just a minute, please. Do not answer until we read it.

The Witness: I am sorry.

(Exhibit examined by the Court.)

Justice Jackson: You answered the question "No."?

The Witness: Yes.

By Mr. Knuff:

Q. I don't know what you mean by "no". A. You asked if I wanted to change my answer after looking at this exhibit.

Q. Yes. And you say you don't care to—

Justice Jackson: (Interposing) The answer was no; isn't that what you said?

The Witness: Yes.

Justice Jackson: Go ahead.

By Mr. Knuff:

Q. When you say that your answer is no, do you mean by that that you never desired to hire the customers'
4338 trucks? A. The question of desire didn't enter into it. We had an established practice in our own business, in our own company. We had warehouses for years before we ever signed a board license contract, and we had continuing arrangements with trucking companies in Newark and in New York, and when we took on the board business we simply continued on with these same trucking contractors, or similar trucking contractors. So the bulletin made no change whatever in our practice.

Q. Mr. Lenci, when you sell board to a dealer at the minimum prices and that board turns out to be of poor quality, do you make any adjustment on the price of that board before you refer it to USG and get their consent?

Mr. Bromley: I object to that as assuming facts not in evidence, to-wit, that he did refer it to USG.

Mr. Knuff: I am asking him for his practice, Your Honor, the practice of this company.

Justice Stephens: Read the question.

(The question was read by the reporter.)

Justice Stephens: The question assumes that he does refer it to USG. Therefore, it assumes a fact not in evidence. You can ask him whether he does.

Mr. Knuff: Suppose I break the question down.

Justice Jackson: That is it.

By Mr. Knuff:

4339 Q. Do you ever make any adjustments on board of poor quality? A. We have had to from time to time.

Q. Now then, whenever you make those adjustments, is it your practice to get the consent of USG before the adjustment is made? A. No, the way we actually—

Mr. Bromley: (Interposing) I object. That is an answer—"No".

Mr. Knuff: He is entitled to explain his answer.

Justice Jackson: I think he is.

Of course, you can get his explanation by just another question.

Justice Stephens: I suppose it goes back to the previous practice, Mr. Bromley, that a non-responsive answer is only objectionable—unless upon the ground of incompetency, irrelevancy and immateriality—in the mouth of the examining lawyer; so that objection will be overruled. But you should, so far as possible, in the interest of time, answer the questions directly, and you can be quite sure, Mr. Lenci, that either Mr. Knuff or Mr. Steffen or Mr. Bromley will bring out the whole truth before you are let off the witness stand.

Justice Jackson: You are doing a remarkably fine job anyway.

4340 The Witness: I was trying to give some additional information that would throw light on both sides.

Justice Stephens: We are not criticizing you at all.

The Witness: I will try to keep quiet.

By Mr. Knuff:

Q. What is your practice? A. At the end of each month when we filed our royalty reports, if there were any settlements during the month for bad material, we attached to that a copy of the credit memorandum which was given to our customers, which showed an explanation as to why the credit was necessary.

Q. Do you know whether USG ever investigated the accuracy or the correctness of that credit memoranda? A. I have no way of knowing.

Q. Did they always allow your claims? A. Yes.

4341 Mr. Bromley: Just to make that clear, didn't this have to do only with royalties?

Justice Jackson: That is what you meant, isn't it? You didn't have to pay a royalty on the board, or so much of the board as was required to make the adjustment?

The Witness: That is right, but we had to file this information to show if we had made any credits for damaged material.

Justice Jackson: Would that make your royalty less?

The Witness: It would also affect our royalty, yes.

Mr. Knuff: My question, if your Honor please, was based upon the provision in Government's Exhibit 37, at page 534, beginning at the third line from the bottom of that page, "or through allowance or adjustments on board which the customer", and so forth.

Justice Jackson: Well, he is telling you what they did.

Mr. Knuff: That is right.

By Mr. Knuff:

Q. Mr. Lenci, when you sold board in pool or mixed cars in certain areas, for instance the Metropolitan New York-New Jersey area, was it your practice to specify the minimum amount that would be sold to anyone in the pool car? A. No.

Q. You didn't specify the minimum amount? A. No.

4342 Q. Mr. Lenci, if you had knowledge that orders for less than straight carload quantities of board had been pooled for the purpose of obtaining the carload price, would you have sold the board at the carload price?

Mr. Oliver: I object to that question as speculative.

Justice Jackson: Do you understand that question?

The Witness: No.

Justice Jackson: I don't understand the question either, Mr. Knuff.

Mr. Knuff: I will repeat it.

By Mr. Knuff:

Q. If you had knowledge that orders for less than straight carload quantities of board had been pooled for the purpose of obtaining a carload price, would you have sold that board to the persons pooling the order, at the carload price?

Justice Stephens: Do you understand the question?

The Witness: It isn't very clear.

Justice Jackson: I don't understand it.

Justice Stephens: Pooled by whom, Mr. Knuff?

Mr. Knuff: The purchasers of board. Under the license bulletins, if three persons pooled their purchases to buy a carload of board, and if the manufacturer had knowledge that that was done for the purpose of obtaining the carload price, then that was considered by the licensor as a violation of the bulletins.

4343 Justice Jackson: Now your explanation is quite clear. Ask the witness.

Mr. Knuff: That is what I have done.

Justice Jackson: Not that way.

The Witness: Well, that is just a little different.

Mr. Oliver: I object. I think it is asking entirely for speculation. The question involves two assumptions. It seems to me that here we are trying to get the facts, not assumptions.

Justice Stephens: The objection is sustained to the question as asked. In view of all this explanation, possibly

you can re-ask the question and the witness will understand it.

Mr. Knuff: Mr. Lenci, if three people pooled their orders—

Justice Stephens: (Interposing) Can't you get at it in a shorthand way, by asking this witness what the practice was that he observed with respect to pooled cars, if he knew about them?

Mr. Knuff: I can.

Justice Stephens: Do that.

By Mr. Knuff:

Q. What was the practice that you observed in the industry with respect to pooled cars? A. That depends on what territory the pooled car was going into, and during what period of time, because the rules were different in different territories, and they varied during this fifteen-
4344 year period.

Justice Stephens: Can you take any particular period and give an illustration of it to counsel?

The Witness: Yes. Early in the period, when there was a differential between carload prices and less than carload prices, which were either delivered by truck or mixed cars in the metropolitan areas, there was a differential of $2. Therefore, if three customers got together and fixed up a carload between them, and if we knew that those three customers were doing that for the purpose of taking advantage of the $2 differential, I would look upon that as a violation.

By Mr. Knuff:

Q. And you wouldn't have sold them the car? A. No.

Q. And did you base your action upon the provisions of the license bulletins as you understood them? A. As I recall it, there was something to that effect in the early bulletins.

Q. Was it your practice, Mr. Lenci, to sell and deliver board in pool truckloads, or is there such a thing in the gypsum industry as a pool truck? A. Yes.

Q. There is? A. As I recall it, the rule is that the truckload had to have the minimum quantity specified for
4345 truckloads during whatever period of time it took place. In other words, the bulletins changed their minimums from time to time. If the minimum truckload

was 7,500 square feet, and if you had a pool truckload, you could have 7,500 feet of board on it, and you could fill out with other materials. But you could not go below the 7,500 feet, as I recall it.

Q. Isn't that a mixed truck that you have in mind there? A. Speaking for our company, we never shipped any pool truckloads.

Q. Is there such a thing under the license bulletins—can you sell a pool truckload of gypsum board?

Mr. Bromley: I object to that as incompetent, because calling for a conclusion. The bulletins speak for themselves.

Justice Stephens: Sustained. You may ask him what his practice was, and what his understanding was.

By Mr. Knuff:

Q. What was the practice of the Ebsary Gypsum Company with reference to selling pool truckloads of gypsum board?

Mr. Oliver: I object because the witness has already answered that he didn't sell pool truckloads.

Justice Jackson: He can answer it again, although he did say that.

The Witness: I don't think we ever sold pool truckloads.

Justice Stephens: Announce the recess.

(Whereupon, a five-minute recess was taken, after which the trial was resumed.)

4346 Mr. Knuff: I have here, your Honor, four samples of board that I would like to have marked for identification as Government's Exhibits 45, 46, 47 and 48, respectively. That is not a misstatement—I mean 45, 46, 47 and 48.

Justice Stephens: Are they vacant numbers?

Mr. Knuff: We left the numbers from 1 to 100 to be used for certain classes of things such as contracts and exhibits of this nature. Then from 100 on are the letters and so forth which the witnesses are identifying.

Justice Stephens: All right.

(The samples of board referred to were marked as Government's Exhibits Nos. 45 to 48, inclusive, for identification.)

Mr. Knuff: I would also like to have marked for identification two strips of tape, as Government's Exhibits 49 and 50, respectively.

(The strips of tape referred to were marked as Government's Exhibits Nos. 49 and 50, respectively.)

By Mr. Knuff:

Q. Mr. Lenci, I show you what has been marked for identification as Government's Exhibit 45. Will you tell us what that is, please? A. That is a sample of our wallboard.

4347 Justice Stephens: A sample of what?

The Witness: Wallboard.

Justice Jackson: Made by the Ebsary Company?

The Witness: Made by the Ebsary Gypsum Company.

By Mr. Knuff:

Q. Can you tell us when that sample was made? A. No, because I took that out of our stock. It was made within the last year or so.

Q. Is it from your regular production? A. Yes.

Q. I show you what has been marked for identification as Government's Exhibit No. 46, and ask you if you will tell us what that is. A. That is a sample of our metallized lath, or foil lath made by the Ebsary Gypsum Company.

Q. Can you tell us when it was made? A. About the same time as the other.

Q. And it is from your regular production? A. Yes.

Q. I show you what has been marked for identification as Government's Exhibit No. 47. Will you state for the record what that is, please? A. That is a sample of the regular gypsum lath made by the Ebsary Gypsum Company.

Q. Can you tell us when it was made? A. Within
4348 the last two or three years.

Q. And is it from your regular production? A. Yes.

Q. I show you what has been marked for identification as Government's Exhibit 48. Will you state for the record what that is? A. That is a sample of the perforated gypsum lath made by the Ebsary Gypsum Company.

Q. And made within the last one or two years? A. Yes.

Q. And it is from your regular production? A. That is right.

Q. I show you what has been marked for identification as Government's Exhibit No. 49. Will you tell us what that is? A. Exhibit 49 is a sample of the tape—

Justice Jackson: (Interposing) Tape?

The Witness: Tape—that we use to bind our wallboard in pairs for shipment.

By Mr. Knuff:

Q. And does that tape have on it any patent markings? A. Yes, it has.

Q. And how long have those patent markings, how long have those same patent markings, been on that tape, or tape of that character, Mr. Lenci? A. Well, I have forgotten when they were revised the last time, but
4349 they have been on for six or eight years, approximately.

Q. The same markings? A. These markings, yes. Prior to that I believe there were different ones, and then they were corrected at some date during the latter 1930's.

Justice Jackson: You mean that the patent numbers were changed?

The Witness: Yes.

By Mr. Knuff:

Q. Are those numbers that appear on that tape the only patent numbers that you are using? A. That I don't know; these are the patent numbers which we show, and I believe they were given to us by the United States Gypsum Company as being the proper patent numbers to put on the tape.

Q. Mr. Lenci, I show you what has been marked for identification as Government's Exhibit No. 50. Will you tell us what that is? A. Exhibit 50 is the tape that we use to bind our lath together in bundles of six, for convenience in handling.

Q. That tape has on it certain patent numbers, does it not? A. Yes.

Q. And how long have those— A. (Interposing)
4350 My answer to that would be the same as to the previous question.

Justice Stephens: You bundle your board in 2's and your lath in 6's?

The Witness: That is right.

Mr. Knuff: We can obtain photostats, if your Honor

pleases, of the tape. I don't know how we can get photostats of the board.

Justice Jackson: You needn't mind that, we can see them.

Mr. Knuff: Would you like to have photostats of the tape?

Justice Stephens: I don't think that is necessary, we can look at them.

Mr. Knuff: We are not offering these at this time, we are simply having them marked for identification.

You may cross examine the witness.

Justice Stephens: Are you ready to cross examine now, Mr. Bromley?

Mr. Bromley: Yes, your Honor.

Could I see the samples of the board and the tape, please?

(Thereupon, Government's Exhibits Nos. 45 to 50, inclusive, for identification, were handed to Mr. Bromley.)

Justice Stephens: Before you proceed—it occurs to the Court, Mr. Knuff, that unless there is some good reason why you don't want to offer these exhibits, the two pieces of tape and the four pieces of board, at the present time, that it might be well to offer them now because otherwise the witness might have to be recalled for further cross examination.

4351

Mr. Steffen: We would rather not offer them now, your Honor.

Justice Stephens: Very well.

Cross Examination

By Mr. Bromley:

Q. Mr. Lenci, your company has a trade name for its wallboard, doesn't it? A. Yes.

Q. What is that trade name? A. Wallrite.

Q. One word, is it? A. One word.

Q. And Government's Exhibit 45 for identification is a small sample of your wallboard which, as marketed, comes in much larger sizes? A. That is correct.

Q. And the sizes in which you market it are shown on the red, blue and white advertising which is pasted on Government's Exhibit 45 for identification? A. There are sizes mentioned on there; I don't know whether that is a complete list, or not. I haven't checked that recently.

Q. Well, at least the product that is marketed as Wall-rite by your company, comes in lengths of 6, 7, 8, 9,
4352 10 and 12 feet, doesn't it? A. That is correct.

Q. And is either 32 inches or 48 inches wide? A. That is right.

Q. And it is either a quarter of an inch or three-eighths of an inch in thickness? A. Or one-half inch, yes.

Q. Or one-half inch? A. Yes.

Q. And it is made so that there is a side to be turned into the room, that is which would constitute the wall, the room side of the wall, and that is the side on which the exhibit number appears, isn't that so? A. That is correct.

Q. And that is the side which stands either as a finished wall, after it is erected, or which is painted for purposes of decoration, isn't that right? A. That is correct, yes.

Q. Now they don't ever put wallpaper over this, do they? A. Sometimes.

Q. Sometimes they put wallpaper over it? A. Yes.

Q. But it is so manufactured that it can constitute the finished wall itself without any wallpaper and without any paint? A. That is correct.

4353 Q. Although it can be either painted or wallpapered? A. That is right.

Q. Do you make this wallboard with a recessed edge so that the seams can be concealed? A. Yes, we do.

Justice Jackson: Is that a tongue-and-groove or a lap?

The Witness: It is neither one. Taking the cream face of the board, there is a slight depression parallel with the long edges, and that is filled with a thin plaster composition and a tape over it, which finishes flush with the surface of the board. That is known as a recessed-edge board.

Justice Jackson: I see.

By Mr. Bromley:

Q. And when that tape and finisher is applied, the eye cannot detect any seam at all in the finished wall? A. We hope not.

Justice Jackson: That is the intention anyhow, isn't it?

The Witness: Yes, that is the intention.

By Mr. Bromley:

Q. Coming to Exhibit 46 for identification, that is a sample of metallized lath, you say? A. That is correct, yes, sir.

Q. And again this product, as well as plain lath, is sold

under your trade name, in this case, Lathrite? A. That is correct.

4354 Q. One word? A. Yes, sir.

Q. And that is a sample of the product which, as marketed, comes in a larger size? A. That is correct, yes.

Q. And about what is the size in which it is marketed? A. The standard size for gypsum lath is 16 inches by 48 inches.

Q. This Exhibit 46 with the foil backing, is designed for the purpose of, in ordinary usage, having the foil backing next to the studding, isn't it? A. That is correct.

Q. This gray paper surface underneath the advertisement is on the inside or room side of the wall, and is the surface to which the plaster coat is applied? A. That is correct.

Q. And the purpose of the foil is to reflect both heat and cold so as to achieve an insulating result, isn't that so? A. That is correct.

Justice Stephens: How can you reflect cold? Cold is the absence of heat.

The Witness: I had rather not go into that. (Laughter.) There is a perefectly good answer for that, but I am not enough of an engineer to give it to you.

Justice Stephens: It sounds to me like reflecting dark.

4355 The Witness: Well, it doesn't reflect—maybe I had better not start this. (Laughter.)

Justice Stephens: Very well.

Mr. Bromley: When I said "reflect"—you are familiar with the simple test, as you not, where, if you hold this surface up towards the sun or toward a blast of cold air, and hold your hand in front of it, you can feel it come back at you, can't you?

The Witness: That is true.

By Mr. Bromley:

Q. Very definitely? A. Yes.

Q. The theory is that this foil will not let either a blast of cold air or a blast of hot air through the foil because it reflects it back in the direction from which it came? A. Yes.

Q. Now Exhibit 47 for identification again is marked Lathrite, but this is a sample of ordinary lath which is used generally in a size larger than this sample, for the purpose of serving as the plaster base, is that correct? A. That is right.

Q. And is it true that this ordinary lath, of which Exhibit 47 for identification is a sample, again comes in a size, generally, 16 by 48 inches? A. Yes, sir.

4356 Q. And with respect to this ordinary lath, it doesn't make any difference which side is toward the interior of the room? A. They are both the same.

Q. Plaster will adhere to either side with equal facility? A. That is right.

Q. And is it true that this lath, when it is erected on the studding, is nailed so that the four-foot dimension runs horizontal to, or parallel with the floor? A. That is correct.

Q. Exhibit 48 for identification is another sample of your product, Lathrite, but this time in perforated form? A. That is right.

Q. It comes in the same size as the plain lath, does it not, 16 by 48 inches? A. Yes.

Q. And its use is similar, in that plaster will adhere to either side? A. Yes.

Q. And it is nailed up on the studding with the four-foot dimension in a horizontal position? A. That is right.

Q. And the holes through which the plaster goes, give the plaster coat added strength so that it can resist fire? A. It gives an additional key to the plaster.

4357 Q. When a dealer, having purchased these products from you, resells to the contracting or consuming trade, does he sell this board under your trade name? A. I don't quite get your question. Do you mean does the consumer ask for it by name?

Q. Well, does the consumer ask for it, or the dealer offer it, by name? A. It may be either way. Some dealers will feature our particular line. Other dealers will carry a line of several manufacturers. On the other hand, there are certain customers who will demand one particular manufacturer's product from the dealer.

Q. When you say "customers" you mean contractors or consumers? A. Yes.

Justice Stephens: What I understood to have been asked of you was whether or not, if this board was sold by you to a dealer, and the dealer resold to a consumer, he sold it in this form under your trade name?

Justice Jackson: Does he sell it under the name of Lathrite when he sells your product?

The Witness: The chances are he just calls it gypsum lath.

By Mr. Bromley:

Q. Well, you conduct advertising, don't you, to advertise your trade names, Wallrite and Lathrite? A. To a
4358 certain extent. We don't do a great deal of advertising.

Q. Now when you commenced to manufacture this board, back in 1928, you made it with the edges open or raw all the way around, didn't you? A. Yes.

Q. And it is true, is it not, that in 1928 and 1929 you found this so-called open-edge board to be an unsatisfactory product for several reasons? A. That is correct.

Q. One of those reasons was, was it not, that it was expensive to make, and it was expensive to make because it was wasteful to make, isn't that so? A. That is correct.

Q. And the waste came from the fact that after it had been fabricated and spread out on this traveling belt of the board machine, a portion of it had to be trimmed off by these revolving saws, of which you spoke, on each side? A. That is correct.

Q. And that resulted in the accumulation, with some rapidity, of great piles of raw edges that were sawed off from the sides, did it not? A. Yes.

Q. That waste was unreclaimable, wasn't it? A. We couldn't use it for anything else whatever.

4359 Q. Didn't you also find, in 1928 and 1929, that the dealer trade demanded the closed-edge board, which was then being manufactured by certain of your competitors? A. Yes, we did.

Q. And therefore wouldn't you say that it became increasingly difficult, after you started to manufacture open-edge board, to sell it? A. It was extremely hard.

Q. At page 4045 of the record, between lines 9 and 17, you testified with respect to a meeting in Chicago in May, 1929, which you attended.

You received a draft of the proposed license from USG prior to the time that you went out to Chicago in May, 1929, did you not? A. Yes, that is my recollection.

Q. Now isn't it the fact that before you left to go out to Chicago in May, 1929, Mr. Ebsary and the rest of the responsible officers and directors of your company had determined and decided to take a license from USG? A. We very definitely realized that we would have to have a license in

order to make a board which we could manufacture economically and which we could market.

Q. Hadn't you reached that decision, however, before you left for Chicago in May, 1929? A. Yes.

4360 Q. When you went out there, didn't you take your lawyer along with you for the purpose of attending to the legal details and putting the contract into a form acceptable to your company? A. That is correct.

Q. Now your lawyer was Harlan W. Rippey, was he not? A. Yes.

Q. He later was United States District Judge for the Western District of New York, wasn't he? A. Yes.

Q. Prior to that time he had his office and practice in Rochester, New York, didn't he? A. Yes.

Q. And later on he became, and is at the present time, a judge of the Court of Appeals of the State of New York? A. Yes.

Justice Stephens: Is that correct?

The Witness: Yes.

Justice Stephens: Mr. Bromley, I don't find on page 4045 any reference to a license agreement. I call your attention to that only for the purpose of keeping the record straight.

Mr. Bromley: I inferred that from the fact that in line 6 the answer refers to a meeting of May 21st and May 22nd, 1929, the testimony being that at that time the license agreement was signed, that is on May 22nd.

4361 Justice Garrett: Also, lines 12 and 13 speak of the proposed license.

Mr. Bromley: Yes, as Judge Garrett says, lines 12 and 13 do refer to the proposed license.

Justice Stephens: I had understood you to say that his testimony showed, at page 4045, that the license contract had been presented to them before they went out there, and I don't find anything to that effect on that page.

Mr. Bromley: I was in error if I said that. I meant to ask him, independent of that testimony, if it wasn't the fact that prior to the time that he went out there a draft of the contract had been sent to his company.

By Mr. Bromley:

Q. That is right, isn't it? A. That is right.

Q. You would say, wouldn't you, Mr. Lenci, that the primary reason for the Ebsary Company taking a license was its desire and need to manufacture a closed-edge type of board? A. Yes.

Q. You knew, did you not, at some time in May, 1929, at least, that the license which was offered, covered many patents other than the Utzman closed-edge patent? A. Yes.

Q. For instance, you knew, didn't you, that it covered the machine for the making of the patented closed edge?

4362 A. Yes.

Q. And you knew, didn't you, that that patent did not expire until sometime in 1937? A. I knew it was much later, I don't remember the date.

Q. So far as you were concerned, were you satisfied that your company needed the right to use all, or a substantial number of, these patents, in order especially to make the closed-edge type of board? A. Yes.

Q. Do you recall that the license agreement which you say was executed on May 22, 1929, specifically provided that price control should expire with the expiration of the Utzman closed-edge patent, that is to say, on August 6, 1929? A. Yes.

Q. Now at any time during the course of your conferences in Chicago on May 21 and 22, 1929, or at any time prior thereto, did you have any knowledge as to what the prices would be, should they thereafter be fixed by USG? A. No, we did not.

Q. Did you have any discussion with Mr. Avery, or did you hear any, or with anyone else from USG, as to what the price or prices would be which would be fixed after you took a license? A. I never knew, and Mr. Ebsary didn't know, what those prices would be until after the licenses were signed and the first of the price bulletins was handed to us.

4363 That was our first knowledge, and I remember very well opening those letters to see what the price was going to be.

Q. Now at page 4047, in testifying as to who was present on May 21st and May 22nd, 1929, you said that Mr. Kelley was there. Isn't it a fact that Mr. Kelley did not attend at that time in connection with these negotiations at all, Mr. Lenci? A. I believe that was a mistake. I had no record to check myself with.

Q. And you now wish to correct your answer which appears at the top of page 4048, which was given to this question:

"Q. Do you know whether Stephen Kelley was out there? A. I think he was".

Do you want to correct that so as to say that your present recollection is that he was not there at all? A. Yes.

Q. At page 4048 you testified that you did not recall as to whether anybody was there representing American. Isn't it the fact, sir, that you have thought about that and your present recollection is that American was not represented by anyone, either on May 21st, May 22nd or May 23d, 1939? A. I don't believe they were represented.

Q. At page 4072 you testified, still with respect to the May 21-22 meeting, that Certain-teed was represented by Mr. C. O. Brown and Mr. Wittemore. Did you know that Mr. Brown has heretofore testified in this case and told us that he was not present at that meeting, Mr. Lenci? A. Yes, I have seen that in the record since. I believe it was George Brown who was there at that meeting.

4364

Q. And do you wish now to correct your testimony so that it will appear that your recollection now is that Certain-teed was represented out there by George M. Brown and Mr. Whittemore, and not by Mr. C. O. Brown? A. That is right.

Q. At page 4052 you testified that you recalled that Mr. Avery said that if all companies would take out a license, that that would correct the demoralized condition which the board industry found itself in. Do you recall that testimony? A. I don't remember that exact wording, no.

Q. Well, you said "yes" to a question which had all those words in it, do you remember that? A. I didn't think that that was my wording. Yes, I probably did say that.

Q. Now isn't it the fact, sir, that you couldn't really recall anything that Mr. Avery said? A. It is a long time ago to remember the exact details of a meeting of that kind.

Q. Well, is it your recollection that Avery said anything in the way of a sales talk to the men who were out there at that time? A. Well, as I remember it, Mr. Avery didn't do anything to try to sell us the license. We had come out there, speaking for ourselves, anxious to take the license. He didn't have to convince us of the necessity for taking it.

4365

Q. Don't you now remember that the other companies that were represented there also had determined to take licenses before they came there? A. I believe they had.

Q. Well then, wouldn't you say, Mr. Lenci, that there was no reason whatsoever for Mr. Avery to attempt to sell the proposition to anybody there present? A. I don't remember what he said, Mr. Bromley.

Q. Well you said, further on down the page—that is page 4052, in answer to the question:

"Q. Do you recall at that time that Mr. MacLeish, or Mr. Avery, illustrated their point by saying that under the General Electric case it was permissible for the owner of a patent to fix the price of a patented product? A. I remember that was mentioned by either one or the other, yes."

Now isn't it a fact, sir, that there was no discussion of the General Electric case at all until you and Mr. Rippey and Mr. MacLeish got off in a side room, and commenced to work on the form of the license which was to be offered and taken by Ebsary? A. Well, that might be, I don't
4366 remember whether it was in the general group or when we talked separately over our specific license. All I do remember was that it was mentioned while we were in Chicago on that trip.

Q. When you say "it", do you mean the General Electric case? A. The General Electric decision.

Q. That mention didn't take the form of saying, "Now we can correct this demoralized price condition because of the Supreme Court's decision in the General Electric case", did it? A. You say it did not take that form?

Q. It did not take that form, did it? A. I don't think it did.

Q. You said on direct examination that Mr. Avery made some reference to the litigation which was then in existence in the industry between his company and other companies. Do you recall that? A. Yes.

Q. Well now, isn't it the fact that if Mr. Avery said anything about "demoralized conditions in the industry", he said it with reference to his mention of the many lawsuits which were then pending between USG and its competitors? A. Well, I think he laid a great deal more stress on the litigation feature than he did on the price feature.

Q. I am trying to find out from you, Mr. Lenci, if I
4367 can, whether it isn't the fact that you don't remember that Mr. Avery said anything about price control at all? A. Well, I think it must have been mentioned at one time, possibly in the meeting that we had with Mr. MacLeish and Mr. Rippey, because that was in the contract and would be one of the things which would be spoken about and talked over.

Q. Well, aren't you confusing the discussion between those two lawyers, MacLeish and Rippey, in your own nego-

tiations, and what was said there, with what Mr. Avery said when he gave this little speech of greeting to the members of the industry assembled on May 21st? A. That may be, I don't remember at which meeting it took place.

Justice Stephens: We will have to take the afternoon adjournment at this time.

Before we do so, I would like to change my mind, Mr. Knuff, about one matter. If you can do so, without undue trouble, I would like to have photostats of those two pieces of tape. I would like to have a complete file, if possible, with every exhibit in it which is feasible to be in it, for the Presiding Judge.

Also, if you could, without undue difficulty, furnish me with duplicates of those samples of board and lath, when you offer them, I would like that also.

The Witness: I can do so, but it might take a few days.

4368 Justice Jackson: It would probably also be better if Mr. Lenci would furnish additional pieces of tape for us.

The Witness: I was going to say that when I got these additional samples, why not also send along extra pieces of tape? It would be much cheaper than trying to make photostats.

Justice Stephens: Yes, we would greatly appreciate that if you could do so. Just send them to the Government and they can deliver them to us.

(Thereupon, at 4:05 o'clock p. m., an adjournment was taken until 10:00 o'clock a. m., Wednesday, February 23, 1944.)

4369 IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA,

Plaintiff,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS,

Defendants.

Seventh Floor,
Internal Revenue Building,
Washington, D. C.,
Wednesday, February 23, 1944.

The above-entitled cause came on for further hearing at 10:00 o'clock a. m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

APPEARANCES:

(Same as heretofore noted.)

4371 You may proceed.

Thereupon, GEORGE N. LENCI the witness on the stand at the time of adjournment, resumed his testimony as follows:

Cross Examination (resumed)

Mr. Knuff: If your Honor pleases, I gave to the Clerk the photostats of Exhibit 513-A. I don't know whether you have them or not.

Justice Stephens: Thank you very much.

Mr. Steffen: Your Honor, I should like to make a
4372 short statement before Mr. Bromley begins.

I should like at this time to renew our objection to the right of defense counsel to ask leading questions upon their examination of a witness called by the Government as if upon cross-examination under Rule 43(b). And in this connection, I wish to base it, first, upon the ground that Rule 43(b) does not permit Mr. Bromley to ask leading questions, as we construe it; and, secondly, upon the ground that I think the Court might, as a matter of discretion, consider that it is improper for Mr. Bromley to ask Mr. Lenci leading questions in view of the examination as it proceeded yesterday, which disclosed that defense counsel have been in conference with Mr. Lenci and have taken up various matters with him, and in no true sense is he the Government's witness. He is represented here by Mr. Varian; on our first talk with Mr. Lenci, Mr. Varian came over as his counsel; and therefore, I think we must say that he, in all respects, is defense counsel's witness, although called by the Government, out of turn, as if upon cross-examination.

And on that matter of whose witness he might be, I would refer Your Honors to page 122 of the Proceedings of the Institute held here in Washington in 1938. The point was not very completely answered, but the Committee at that time stated, in effect—

4373 Justice Stephens: (Interposing) you mean the American Law Institute?

Mr. Steffen: No, the Institute which prepared these rules. The committee which prepared these rules stated, in response to a direct question, that the person calling a witness as if upon cross-examination was entitled to do with him everything which he might do if the defendant had first called him and he was then being cross-examined; and that therefore, the question of whose witness he was was an academic question. In other words, they refused to say that he was the witness of the person calling him as if upon cross-examination.

I would like to have a continuing objection, in the event Your Honors overrule me.

Justice Stephens: The record may show your continuing objection, and that it is overruled. We think it would be error to deny the defendants the right to cross-examine this witness. The witness seems to us a fair witness towards both sides in the case, and we do not think the rule contemplates that because the plaintiff calls a witness, the opposite party is denied the right of cross-examination.

By Mr. Bromley:

Q. You said yesterday, on cross-examination, Mr. Lenci, that you thought price control must have been men-
4374 tioned in May, 1929, in Chicago, "because that was in the contract and would be one of the things which would be spoken about and talked over."

In connection with that answer—

Justice Garrett: (Interposing) That is on page—

Mr. Bromley: (Interposing) Page 4660, near the top.

By Mr. Bromley:

Q. Isn't it now your best recollection that if price control, or the General Electric case, were mentioned at all by anybody, it was mentioned in the conference between your lawyer, Judge Rippey, and Mr. MacLeish, and not by Mr. Avery? A. That may be right.

Q. Well, can't you give us your best recollection? A. Well, it is a long time ago, and it is awfully hard to place it exactly, but I do know that those things were discussed between Mr. Rippey and Mr. MacLeish.

Q. Well, isn't it the fact that you just do not have any recollection, so far as what Mr. Avery did or did not say on this subject is concerned? A. My recollection is not too clear.

Q. Well, isn't it more than that? Isn't it the fact, the true fact, that you have no recollection about it at all, and you merely think that the subject must have been mentioned by someone? A. Well, I know it was mentioned by someone.

4375 Q. And you know that because price control was in the contract? A. Yes.

Justice Stephens: What page are you referring to?

Mr. Bromley: Page 4660, the first answer at the top of the page, on cross-examination.

Justice Stephens: Page 4660?

Mr. Bromley: Yes, sir, that is in yesterday afternoon's session, near the end.

Justice Stephens: Oh, yes.

By Mr. Bromley:

Q. You were in Chicago in May, 1929, in connection with license matters, on May 21, May 22, and May 23, weren't you? A. Yes.

Q. And how many occasions, on those three days, were there on which all of the representatives of companies there

present assembled in a room together? Did that happen once, twice, three times, or how many times? A. Well, to the best of my recollection, they all assembled there on May 21, on arrival,—I mean, that was the first day. I believe they all met on that morning. I don't believe there was another complete assemblage that afternoon, I am quite sure there wasn't, and I don't think there was the second morning. But I think during the second afternoon they
4376 were probably all there.

Q. Well, what was that occasion? A. Well, to make it a little clearer, after they met on the first day, they all broke up to consider their individual problems under the proposed licenses, to get their licenses straightened out and signed; and to the best of my recollection, that was done during the afternoon of the first day and the morning of the second day. And after that was completed, then they met during the afternoon of the second day.

Q. What was that meeting about? A. When the ones who were going to sign had signed up, I think they just naturally drifted back together again.

Q. Was anything done or said at that meeting? A. The reason I say I think they were mostly all there is because that was the time that the price bulletins were given out, the first bulletins.

Q. Well, is that all that transpired at this afternoon meeting on May 22, so far as you can remember, the giving out of the price bulletins? A. I don't think there was very much.

Q. You mean very much else? A. That is right.

Q. Now the next day, on May 23, there was a third occasion when all the representatives came together in
4377 a common place, was there not? A. Yes. That must have been in the morning, because most of us left on the trains leaving around noontime.

Q. And that was the occasion, was it not, at which the bubble invention was explained by Mr. Avery? A. That is correct, yes.

Q. Up to that time, had any mention been made by anyone from USG of the fact that there was a bubble invention covering the manufacture of light-weight board, so far as you can remember? A. That was the first I ever heard of it.

Q. And, of course, there was nothing in the license contracts that were executed on May 22, that covered the bubble invention? A. No.

Q. Now let me ask you this: At any of these meetings in Chicago in May, 1929, at any time, whether you were all together or whether you weren't, were there any understandings reached among you, or agreements, other than those expressed in the written license contracts, one of which you signed? A. No.

Q. And to make that specific, were you a party to or did you know of any agreement or understanding to the effect that the licensees would discontinue the manufac-
4378 ture of open-edge board and no longer make it? A. Was there an agreement to that effect?

Q. Yes. A. No.

Q. Now you have told us, as I remember it, that so far as your company was concerned, it was your policy to go over, once you get the license, to the production of closed-edge board? A. We were very anxious to.

Q. And you determined, yourself, no longer to make open-edge board, didn't you? A. Yes.

Q. Now was that a matter which was determined by you and your company officials, independently of anyone else? A. Yes, very much so. We were very anxious to get into it, to make the closed-edge board.

Q. And at that time, in Chicago, or at any other time in 1929, did you have any understanding or agreement with anyone with respect to the prices which you would either quote or charge on such open-edge bo. d as you might sell after May 22, 1929? A. No.

Q. Did you have any understanding or agreement with anyone with respect to the prices which you would quote or charge for second grade board, or No. 2 board,
4379 which you might have on hand and offer for sale, and sell?

Mr. Steffen: That refers to open-edge?

Mr. Bromley: Open-edge, yes, not covered by the license.

The Witness: No, not any that wasn't covered by the license, no.

Mr. Bromley: Will you show the witness Exhibits 405, 406, and 407, please?

(Government's Exhibits Nos. 405, 406, and 407 were handed to the witness.)

By Mr. Bromley:

Q. Will you tell us what prices those figures are that are mentioned in that exhibit, Exhibit 405? First, tell us whose prices they are? A. They are prices that we estab-

lished, our company established, and sent to our salesmen for use, for quoting on our open-edge board as long as it lasted, and then you will note a reference to the new covered-edge wallboard, when ready.

Q. In the next to the last paragraph? A. Yes.

Q. Is it to be inferred from this Exhibit 405 that your company received these prices from its customers on any sales that were made of open-edge board? A. I doubt—

4380 Mr. Steffen: (Interposing) That asks for a conclusion, Your Honor, that you can't draw from this particular exhibit, certainly.

Mr. Bromley: I will withdraw it.

By Mr. Bromley:

Q. Can you tell us whether or not, as a matter of fact, your company received these prices from its customers to whom it may have sold open-edge board at or after this time?

Mr. Steffen: If you know.

By Mr. Bromley:

Q. If you know, yes. A. Well, I was going to say I doubt very much if we did.

Mr. Steffen: I move to strike that, Your Honor. He simply states his doubts. He knows or doesn't know.

Justice Stephens: It doesn't seem to the Court that it ought to be stricken. You have asked this witness dozens of questions of this sort in the course of your examination, or Mr. Knuff has. Why should the defendants be denied the right to probe into what the defendant recollects?

Mr. Steffen: I have no objection to his probing. He just simply says, "I doubt", and that is what I want to have stricken.

Justice Stephens: I am of this view, and I think
4381 my colleagues share it, Mr. Steffen—I have announced it before in the course of similar objections—while it is true you have been asking leading questions of this witness, you examined him on direct-examination and you will rely, and you have a right to rely, upon the statements that he made as a foundation for the Government's case.

Now the defendants, as we understand the rules, are entitled to cross-examine him and to try to weaken the force of his direct statements. And one of the ways in which they can do that is to test the reasonableness of his

direct statements, just as you could if you were cross-examining a witness who had been relied upon by your opponent on direct-examination. For that reason, to ask for conclusions or inferences, on cross-examination of witnesses who have been called on direct-examination, is permissible because it goes to the dependability or reasonableness or credibility or accuracy of his statements on the examination on which you rely.

This particular answer isn't of very great importance one way or the other, but since it does present that question we want counsel to be fairly advised upon it. It is not our view that it is forbidden, upon cross-examination, to go into the witness' state of mind, including his reasons, his doubts, his conclusions, his inferences, if to do so has a bearing upon the dependability, correctness, ac-
4382 curacy or truthfulness of his statements on direct-examination. On direct-examination you often can't go into conclusions, because you are required there, if you are proving contracts, to show what actually happened, what was said, and there you are calling the witness as your own witness and you are accrediting him, you are relying upon him.

The fact that you lead this witness under Rule 43 doesn't alter the fact that you are relying upon him as the Government's witness, you are presenting his testimony with the hope of convincing the Court that it constitutes a part of the case of conspiracy and combination and unlawful price fixing.

It seems to us it would be error to deny to the opposite side the opportunity to attack the force of his testimony.

Mr. Steffen: I would like to say that we, of course, rely on any testimony, whether elicited on direct or upon cross-examination, and I don't think that goes to the question of whether he is our witness, or defendants' witness, or just a stray witness, which I think largely he is at this particular juncture.

My objection was not to the question, which I think was appropriate, but simply to the answer, which I thought was purely speculative and ought, therefore, to be stricken.

Justice Stephens: The objection is overruled. The motion to strike is denied.

4383 I might add that it seems to us, Mr. Steffen, the premise of your objection is unfounded. You say—I know you speak in good part and colloquially—"a stray witness", that he is neither your witness nor the other side's

witness. But the plain fact is that you call him to prove your case, in part, and when you call him you rely upon his statements, you accredit them, you offer them to the Court. Therefore, the opposite party has a right to attempt to modify them, or qualify them, or indicate that he misunderstood your questions, or to vary them in any way in which it properly can; and we think this is not improper. You surely rely upon this witness' testimony, don't you?

Mr. Steffen: We most positively do rely upon this witness' testimony, but we rely upon it as we would upon any other evidence which we elicit upon cross-examination. And if I might state, without going into any lengthy talk and all in good part, we rely upon it as coming under Section 43(b), which says that "a party may call an adverse party, or an officer"—and Mr. Lenci is an officer—"of a public or private corporation or of a partnership or association which is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects"—it doesn't say "in some respects"—, "as if he had been called by the adverse party."

This rule has the force of statute, and it is bind-
4384 ing upon any and all trial courts. That seems literally to say that it is as though Mr. Bromley had first called Mr. Lenci and we are then, under the rule, entitled to interrogate him by leading questions, to qualify and impeach in all respects as though Mr. Bromley had first called him. Of course, that goes to our basic objection, which Your Honor has kindly permitted us to have as a continuing objection, to all this line of testimony. But I think, in fairness to our case, we will have to insist upon that in order to protect our record.

Justice Stephens: You may make your record, and your record is fully protected, and we have no objection to your doing that. But I might say informally that I had something to do with the formulation of these rules. Indeed, I was the person, as Assistant Attorney General, who advised the introduction of the statute as a result of which the Supreme Court was given power to compile these rules. It was I and one other who selected Major Tolman, who later became Secretary of the committee at the time, to commence the work and I kept in close touch with it. And I may say that the rules have been a considerable disappointment to me. They seem to me to be very unfair to defendants. I don't think they were calculated to be so, but I

think it is the almost universal judgment of the bar that the rules are extremely unfair to defendants and give an extreme advantage to plaintiffs.

4385 Of course, we are bound by them, and we realize that. And we are a trial court in good faith trying to obey them. I do not believe, and I do not believe the Supreme Court will take the extreme position, that they go so far in their advantage to plaintiffs and disadvantage to defendants as to deny to a defendant the right to ask leading questions of a defendant on whose testimony the opposite party relies. I think that would be extremely unfair, and I do not think the Supreme Court would sustain any such position.

Proceed with your examination.

By Mr. Bromley:

Q. Isn't it your best recollection now, Mr. Lenci, that as a matter of fact, your company did not receive, in the majority of instances, for its open-edge board, the prices which you directed your salesmen to quote in Exhibit 405? A. Yes, that is the reason I said I doubted very much if we did receive those prices, because at that time we had orders taken below these prices, and we were selling below these prices, had to sell below these prices.

Q. Well, isn't it the plain fact that in the market at that time, with closed-edge board being offered and sold by competitors, it was completely impossible for your company to get prices as high as these contained in these three

43[illegible] exhibits, for open-edge board? A. Yes, the customers wouldn't pay for it.

Q. And isn't it the fact that so far as your supply of open-edge board was concerned, in 1929, you had to take what you could get for it from your customers? A. We tried to get as much as we could for it. We didn't throw it away, because we couldn't afford to, but we did try to get as much as we could and to get out with the least amount of loss.

Q. And would you say that that resulted in a wide variation in the amount of the price which you received from different customers, over this period, for open-edge board? A. Yes, it did.

Q. Some reference was made on your direct examination to the fact that the prices contained in Exhibits 405, 406 and 407 were the USG bulletin prices. You understood, didn't you, at this time, that USG was not fixing your price for open-edge board? A. That is correct, yes.

Q. And it is the fact, then, that these prices in these three exhibits, 405, 406 and 407, while they may have been the same in amount as the prices fixed by USG for closed-edge board, were not USG bulletin prices? A. No, they were not.

Q. And did you have any understanding with
4387 USG or anyone else, that following your signing of the license you would direct your salesmen to quote for your open-edge board the same price that USG had fixed in its first bulletin for closed-edge board? A. No.

Q. Can you tell the Court what your reason was, if any, for sending these prices out to your salesmen? A. Well, we naturally were trying to get our price—get as much for this open-edge board, that we had left on our hands, as we could—and we sent these prices out to our salesmen as a sort of a standard to get up to. We knew we couldn't get any more than these prices, and we hoped we would get as near them as we could.

Q. And likewise, did you issue the instruction to your salesmen contained in the first paragraph of Exhibit 407, with respect to billing weights, as a matter of your own independent policy? A. Yes.

Q. And is it true that you had no agreement or understanding with USG or anyone else as to what, if any, billing weight you would use on open-edge board? A. No, there was no understanding or discussion about the weight of open-edge board.

Q. I said a minute ago, impliedly, in one of my questions, that the prices contained in these three ex-
4388 hibits were the same, in amount, as those contained in the USG price bulletins for patented, closed-edge board. Is that true, do you know? A. I believe that to be true. I would like to check it before I could say yes or no to it.

Q. Will you look at Exhibit 404, please? A. I don't think that my prices are as complete as the bulletin prices.

(Exhibit 404 handed to the witness.)

By Mr. Bromley:

Q. Now looking at Exhibit 405 and Exhibit 404, the price of $13.50 which you sent on your 3/8" lath, open-edge, is the same figure as Exhibit 404, the USG price bulletin of May 23, sets for 1/4" and 3/8" plasterboards which are seconds—isn't that right? A. No—

Justice Garrett: (Interposing) Pardon me, Mr. Bromley. Exhibit 404 is a 3-page exhibit. Would you mind giving the line there?

Mr. Bromley: Yes, sir, on the first page, right in the middle of the page, the prices read starting at $20.00, $17.50, $17.50, and $22.50, and then $15.00. And then below the next paragraph you see a price of $13.50.

The Witness: That $13.50 price is for 1/4" and 3/8" plasterboards, but not seconds. That is a new
4389 paragraph starting there. The paragraph reading "SECONDS" refers to the line above it. It says 3/8" gypsum wallboard SECONDS—

Justice Stephens: (Interposing) $15.00?

The Witness: Yes, sir.

By Mr. Bromley:

Q. Well, turning to Exhibit 405, we find that you have instructed your salesmen to quote $15.00 for open-edge wallboard. A. Yes.

Q. There is an instance in which you set as your price, for the purpose of quotations for open-edge, first-grade wallboard, the same figure which USG had set for second-grade wallboard; is that true? A. For seconds.

Q. Seconds, closed-edge wallboard? A. That is correct.

Q. That $17.50 price in Exhibit 405 is a price which you instructed your salesmen to quote covering the sale of your new covered-edge wallboard when and if you should get into production of it and have it made? A. That is right. The first two words of the third paragraph, "When ready", should be attached at the end of that sentence which reads, "New covered-edge wallboard"—giving the sizes—"$17.50 per M sq. ft. f.o.b. mill, when
ready." If you will notice, that correction was made
4390 in all of the copies at the time.

Q. And is that likewise true in the middle of Exhibit 406? A. Yes, you will notice a pencilled correction was made in that a long time ago.

Q. Looking again at Exhibit 405, the handwritten note on the left-hand margin, "To be discontinued as soon as new board is ready", I ask you again, was your decision to discontinue the manufacture of open-edge board your own determination and not the result of any understanding with anyone else? A. Yes.

Q. You said at page 4095 of the record that you couldn't make open-edge and closed-edge board at the same time.

You merely meant that as a matter of mechanical possibility or practicability, didn't you? A. Oh, yes.

Q. You had no understanding that you would not make them both at the same time, or any other time? A. No.

Q. Then on the same page, lines 21 to 23, in answer to a question of Judge Garrett you said, "If you have in mind if we had any open-edge board still in stock, of course we would have to sell that at this price."

4391 What did you mean by that answer? A. I don't get enough of the context there to recall.

Q. Judge Garrett said:

"I would have interpreted that, myself, to mean that they were to discontinue the quotation of prices on open-edge board when the new board went into production."

And you said:

"If you have in mind if we had any open-edge board still in stock, of course we would have to sell them at this price."

A. Well, I meant at the prices mentioned in my letter of May 23, 1929, Exhibit 405.

Q. When you said you would "have to sell" it at this price, you meant merely as a matter of business policy? A. Yes, that we couldn't get any more than that.

Q. You did not mean by that answer to indicate that you were compelled or bound to sell open-edge board at any specified amount, did you? A. No.

Q. Now, did I understand you to say that the Ebsary Company had never made a second-grade board? A. That is correct.

Q. At any time? A. That is right.

Q. Either open or closed-edge? A. That is right.

4392 Justice Garrett: Going back to that matter there, in view of the fact that I asked some questions about it,—I mean on page 4095,—in my questions I was seeking the interpretation of those notes on the side, and the witness stated that they meant they would discontinue the manufacture of open-edge board. The question of mine which you read was to the effect that I, independent of his explanation, would have interpreted them to mean that he would discontinue the quotation of those prices.

Mr. Bromley: And he said no, that wasn't so.

Justice Garrett: No, he said that meant they would discontinue the manufacture of the board after they began the manufacture of closed-edge board. That is the way I understand it.

The Witness: That is right.

By Mr. Bromley:

Q. But would continue, Mr. Lenci, quoting prices on open-edge board until you had sold it all? A. That is right.

Q. And in your answer to Judge Garrett, you meant that you would go ahead quoting prices, such as are contained in Exhibit 405, getting what you could for the board, until it was all disposed of? A. That is correct.

Q. And, of course, after you ran out of your
4393 supply of open-edge board on hand, you discontinued quoting prices? A. Yes.

Q. You didn't have any to sell? A. That is right.

Q. Now, did you have any understanding or agreement with anyone with respect to standardizing your methods of manufacture, outside of any license agreement, I mean? A. As to the machinery to be used or the product to be made, which do you mean?

Q. Well, as to machinery to be used, first, outside of the license agreements. A. Well, there wasn't any understanding. There was only one place to go, that I know of, to buy a board machine.

Q. Where was that? A. That was the Ehrsam Manufacturing Company in Kansas. You see, there are not very many board machines sold, so you can't go around and buy a board machine like you can a LaSalle, and this was the only place we knew to go to buy a board machine, and we went to these people and they gave us a price on the board machine, and we bought one.

Q. This Ehrsam Company is no part of USG, is it? A. Oh, no.

Mr. Steffen: May I have that related as to time? When was that board machine purchased?

The Witness: It was purchased in 1928. It was
4394 in operation about the middle of 1928, so I would say it was purchased probably in the early spring of 1928. It took some time to install it.

By Mr. Bromley:

Q. Did you have any understanding or agreement that if you took the license, USG would raise or stabilize prices on patented board covered by the license? A. No.

Q. And you said yesterday, didn't you, that you never had any discussion at any time with Mr. Avery, or anyone else, as to what price he would establish after the execution of the license? A. That is correct.

Q. Did you have any understanding or agreement with anyone with respect to what price you should quote or charge for plaster? A. No.

Q. Or for other unpatented articles, such as tile block and Keene's Cement? A. No.

Q. And did you enter into or know of any agreement or understanding that jobbers would be eliminated from the distributive system of gypsum board? A. No.

Mr. Steffen: Those questions are all outside of
4395 the license agreement, as I understand it.

Mr. Bromley: Yes.

Mr. Steffen: Does the witness understand that?

The Witness: Yes.

Mr. Bromley: Well, inside the license agreement. You don't contend that there is any agreement in the license agreement that jobbers will be eliminated?

Mr. Steffen: We not only contend it, but I think we have proven it. The license agreements, followed by the bulletins.

By Mr. Bromley:

Q. Did you have any understanding or agreement with anyone else that at any time in the future a jobber discount would be discontinued, and the price to jobbers made the same as the dealer price? A. We had no understanding on it at all.

Mr. Steffen: That question also is outside of the license agreement and the bulletins?

Mr. Bromley: No, either out or in. However, I will limit it first to outside the license agreement.

By Mr. Bromley:

Q. You didn't have any understanding that the jobber price would be, at some time in the future, subsequent to 1929, raised to the amount of the dealer price? A. No.

4396 Q. Now, was it your understanding that there was anything in the license agreement, or in the bulletins, which prohibited your selling your goods to jobbers? A. No.

Q. There came a time, in 1930, did there not, when you received a bulletin which fixed the jobber price at the same figure as the price for dealers? A. That is correct.

Q. Now, did you have any part in that determination, or did it come as a surprise to you when you got it? A. It

came as an order, as a direction in the form of a bulletin. We had no part in making that up.

Q. You said yesterday that you knew the Utzman closed-edge patent expired on or about August 6, 1929. At any one of these occasions in May, 1929, when you were in Chicago, did you have any understanding, or did you know of any understanding or agreement, with anybody, that if you would sign your license and the others would sign theirs, USG would find some patent or find some way to continue price control after August 6, 1929? A. No.

Q. And after Mr. Avery disclosed to you gentlemen present on May 23 the scope and nature of the foam or bubble board invention, did you gentlemen, in your company, decide that you wanted to obtain the right to
4397 use that invention? A. Yes, we did.

Q. Do you recall what Mr. Avery said with respect to the matter of offering your company, and others, a license under the foam or bubble invention? A. I don't remember his exact wording, but I remember that he explained what it was, and that the USG had secured the American rights for it, and that it was going to be offered to us.

Q. Do you recall that he said the invention was in the application stage in the Patent Office? A. Yes.

Q. And you testified, at page 4161, in a manner similar to your present statement, that Mr. Avery said the USG had obtained the American rights to the Bayer invention. Now don't you recall that as a matter of fact, Mr. Avery told you that at this time there were three inventors of the foam or bubble system, each one of whom had filed an application for a patent in the United States Patent Office? A. I remember only two, I remember the Bayer patent, the Bayer application, and the Roos application. The other I don't recall.

Q. Don't you remember there was a man named Rice, who had also filed an application—R-i-c-e? A. I have heard that name, but I don't remember it.

4398 Q. Do you recall that Mr. Avery told you, on May 23, that these applications were all in interference proceedings at that very time in the Patent Office? A. Yes.

Q. Do you recall further that so far as what you have called the American rights are concerned, what Avery said was that USG had a contract which provided that if Mr. Bayer won the interference proceedings then pending, USG would get exclusive United States rights, so far as

gypsum was concerned, under any patent which might thereafter be issued to Bayer? A. Yes, that is right.

Q. And you know, don't you, Mr. Lenci, that, of course, Mr. Roos eventually was given priority, and in 1934 or 1935, the foam-bubble invention patents were issued to Roos and not to Rice or to Bayer? A. That is right.

Q. And Mr. Roos, Carlisle K. Roos, was an inventor in the employ of the United States Gypsum Company at that time? A. That is right.

Q. What was the advantage, as Mr. Avery explained it, if he did, of the foam or bubble invention? A. Well, the primary advantage was that it would make a very much lighter board. This decrease in the weight
4399 would be a great saving in our freight charges, and it did have that result.

Q. Do you mean by that that it lowered the delivered price, made up of mill base plus freight, which the dealer-customer had to pay for board? A. Yes.

Q. That was because, weighing less, the freight that he had to pay was less? A. That is right.

Q. This system also did away with the necessity of using sawdust in the board, did it not? A. Yes.

Q. Up to this time, had it been your practice to introduce a certain amount of sawdust in the board in order to get lighter weight? A. Yes.

Q. And it was the fact, wasn't it, that due to the demand of the gypsum companies, sawdust was getting very difficult to obtain? A. It was hard to get, and you couldn't tell what kind of wood you might get, you would get all sorts of stains from the resin or the liquid in the sawdust.

Q. You mean the various chemical substances in sawdust would adversely affect the appearance of the
4400 board after it was made? A. Yes.

Q. And would those same chemical substances, present in the sawdust, also affect such things in production as the set of the gypsum? A. I don't recall that we had that trouble.

Q. In connection with Mr. Avery's disclosure of the foam or bubble invention, you took out a license sometime in October, 1929, I believe? A. Yes.

Q. Now, did you have any arrangement or agreement or understanding with anyone, outside of that license agreement, to the effect that you would take a license only if someone else did? A. No.

Q. And was it the independent decision of the management of your company to take a license under the bubble or foam inventions, and others specified in the license, because you desired to get the right to use the patents in your manufacturing processes? A. That is correct.

Q. You told the Court on direct that you went back to Chicago on or about the 6th of June—that is at page 4171—and that a meeting was held on that date in Chicago, and you were asked a great many questions, commencing at page 4170, and following, as to what discussions
4401 there were at that meeting concerning prices for patented board, and other matters.

Isn't it a fact that so far as prices and terms and conditions of sale were concerned, everything that was said there was limited to patented gypsum board, and did not extend to unpatented products? A. That is right.

Q. And isn't it true, Mr. Lenci, that that statement applies to your testimony with respect to all these meetings about which you have testified, from June 6, 1929, right on down through the licensee meetings? A. That is correct.

Q. Right down to the present time, if any have been held this late? A. Yes.

Q. That is to say, that the matters brought up there, and the questions asked and answered, had to do only with patented gypsum board and not unpatented products? A. That is right.

Justice Stephens: We will take the morning recess.

Before we do so, I should like to add to the Court's statement, concerning the objection of the Government to the asking of leading questions of this witness, the following:

The Court is well aware of the fact that Rule 43 provides that an opposite party or the officer of an
4402 opposite party, if it is a corporation, may be called, and that leading questions may be asked, and that he may be impeached or contradicted. But as the Court understands the reason for that rule, it was this,—that under the old rule, if a party plaintiff called a defendant to testify, or the officer of a corporate defendant, such party couldn't impeach him, or couldn't contradict him, even though he was very hostile actually, unless in the discretion of the Court it was permitted that he be cross examined.

That was unfair to the party calling such a witness. So I understand the purpose of the rule-makers was to relieve the party calling an adverse witness of that disadvantage. It doesn't seem to me to follow at all, from

that, that the purpose of the rule-makers in drawing 43(b) was to strip the opposite party of all of the rights with respect to cross examination which the opposite party had always had with respect to a witness called by its opponent. It seems to the Court that the Government is asking the Court to construe this rule as if it read, in terms, not only that the plaintiff, speaking in terms of the present situation, may call an adverse witness, an adverse party, or the officer of an adverse party, and lead him, but as if the rule also explicitly stated that the defendant in such a situation was forbidden to cross examine the witness relied upon by the plaintiff because leading ques-
4403 tions are a necessary part of cross examination.

It seems to the Court that the rules, although they do—I think it is universally accepted by all experienced judges and lawyers—operate, as drafted, unfairly in favor of plaintiffs, were certainly intended by the rule-makers to be fair to both sides, and it seems to the Court that they ought to be administered fairly to both sides except where they explicitly require an unfairness which the Court cannot escape because there is an explicit statutory direction, in effect, in the rules.

Mr. Steffen: May I say one word on the matter of fairness?

Justice Stephens: Yes.

Mr. Steffen: In this case, as Your Honors have observed, we have had to make out our entire case from gypsum men. We have no witnesses that can be looked at as plaintiff's witnesses in that they are favorable witnesses, and it is only because of that fact that we had to resort to the defendants, or officers of the defendants.

As I visualize the rule, it was intended to work either way, that a defendant likewise can call a plaintiff and put him on the stand. So it would seem to be, on that score, on paper at least, a perfectly fair rule.

Justice Stephens: Well, I think, Mr. Steffen—and I say this entirely in good part—that if you were in
4404 one of the very many cases in which the Government is a defendant—there are lots of them—you would find, if the opponents urged this rule, you would be very much disturbed by it.

We will now take the morning recess.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

4405 Justice Stephens: Proceed.

By Mr. Bromley:

Q. During your direct examination, Mr. Lenci, about this meeting of June 6, 1929, in Chicago, you were asked many questions similar to the one appearing on page 4170, as follows, beginning on line 6:

"Q. At the meeting of June 6th, was there any discussion concerning the price at which gypsum products should be sold to house wreckers?"

And you answered: "A. Yes."

Now at this meeting of June 6th, was there a discussion about prices? A. No, I think the thing was an inquiry as to how house wreckers should be classified under the bulletins.

Q. And when you say that you think the thing was an inquiry, you mean an inquiry from one of the licensees, made of the licensor? A. Yes.

Q. And was that inquiry in effect a question as to the interpretation, or provision, or lack of it, in the existing price bulletins? A. Yes.

Q. Was there any "give and take" in the sense of a discussion, as to what should or should not be the prac-

4406 tices or prices, followed by a vote or a decision in any form? A. Oh, no, no.

Q. And when you answered these questions which were addressed to you so frequently, in the affirmative, that this and that was discussed at the meeting, isn't it a fact that you meant merely to say that these matters were brought up by way of questions from the licensees, and answers given by the licensor? A. Yes. You must realize that those bulletins were entirely new to all of us, and we couldn't always understand what they meant, and we would make the inquiry and United States Gypsum Company's representative would say that this means so-and-so, or that this is interpreted in this way. We were looking for information.

Q. But you did not mean to suggest by your direct testimony that any agreement or understanding was reached with respect to what should or should not be in the bulletins? A. No.

Q. And did USG make any commitments or promises or undertakings as to whether it would make changes in the bulletins, or add new provisions to the bulletins in the future? A. No. If it was a simple question, like that question of house wreckers, I believe that was answered immedi-

ately by Mr. Henning, or whoever represented the USG. Sometimes we would ask questions which they would
4407 have to think about, and those would come out in later bulletins.

Q. You testified in this connection at page 4177, beginning at line 20, as follows:

"Q. And you say that that custom of either selling it or else giving it away, had been prevalent in the gypsum industry for some time, is that correct? A. Yes, as I recall it."

You were referring to the giving away of filler. Do you recall that? A. Yes.

Q. Now the giving away of filler by the manufacturers was not a custom in the sense that it was a generally accepted or approved practice in the industry, was it? A. It was decidedly not approved.

Q. It was what the industry— A. (Interposing) It was a bad habit.

Q. It was what the industry regarded as an unfair trade practice, wasn't it? A. Yes.

Q. And all you meant to say by that testimony with respect to that, was that it was an unfair practice which was indulged in frequently by many companies? A. That is right.

Q. Is it a fact that the giving away of filler, as you discussed it in your direct testimony, was merely an-
4408 other way for a manufacturer to give a rebate in connection with the sale of his patented board? A. Yes.

Q. Do you recall that at this very time, that is in June, 1929, there was in existence a set of fair trade rules adopted by the industry under the guidance of the Federal Trade Commission, for the gypsum industry? A. Yes, I believe that was in 1929.

Q. And do you recall that among such rules was what was known as Rule 13, entitled, "Unfair specific practices", which provided that included within the practices prohibited, where they constitute rebates or where they are indulged in for the purpose and with the effect of discriminating in prices, and terms among purchasers of the same class purchasing under like conditions, are, among other things, the furnishing of materials without charge? A. Yes.

Q. So that at this very time, at the time of this discussion at the June 6th meeting, in your industry the Fair Trade Practice Rules prohibited, as an unfair trade practice, the giving of rebates in indirect fashion, among others

such as the giving away of free materials with an order of materials which were sold at a price? A. That is correct.

Q. And in connection with that meeting you tes-
4409 tified at page 4182, that some questions were asked with respect to protected jobs—do you recall that? A. Yes.

Q. And you gave the illustration on page 4181 of the contractor on the Pentagon Building who, in order to protect himself under his contract, would place an order with a manufacturer for a large amount of gypsum board. A. That is right.

Q. And you said that in connection with the meeting of June 6th there was some discussion about the taking of unlimited orders at a price, didn't you? A. Wasn't that, that we had taken orders which were not completed at that time? In other words, they had been taken without a limitation as to date of delivery by our company?

Q. Yes. You said there was some talk as to the length of time you would be permitted to protect a contractor on his purchases—no, I see you said you didn't remember any such discussion. A. That is right.

Q. Then you said that much later on a bulletin was issued by the licensor which provided that orders could be booked ahead only on specific jobs, and that the licensees couldn't take orders for unlimited quantities unless some particular job was involved. Was that right? A. That is my recollection, yes.

4410 Well, isn't it a fact that the only discussion that was had with respect to this matter, at that meeting, was that some of the licensees asked questions as to whether there was any restriction in the bulletins, or not? A. Yes, I think that we asked the same question ourselves.

Q. And the answer was that at that time there was no restriction in any of the bulletins? A. That is right, as I remember it.

Q. However, there was again another rule, do you recall, among the Fair Trade Practice Rules, Rule 16, which provided that a contract of sale which permits the buyer to cancel, or provide for a reduced price in the event of a market decline, and which does not permit the seller to cancel, or provide for an enhanced price in the event of a market rise, is lacking in mutuality and tends to induce controversy and breach of contract, and is therefore condemned by the industry? A. Yes.

Q. Now will you look at Exhibit 421, please?

(Thereupon, Government's Exhibit No. 421 was handed to the witness.)

Justice Garrett: Was the last provision you read one adopted by the Federal Trade Commission, or was it one of the regulations that was recommended—

Mr. Bromley: (Interposing) I was quoting from the regulations themselves, as adopted and approved.

4411 Mr. Steffen: May we have the date and also by whom they were adopted, please?

Mr. Bromley: June 10, 1929, is the date.

Mr. Steffen: And they were adopted by whom?

Mr. Bromley: They were adopted by the gypsum industry in March, 1929, and approved by the Federal Trade Commission thereafter on June 10. They are Defendants' Exhibit No. 3 for identification in this case.

By Mr. Bromley:

Q. Will you look at the first paragraph in Exhibit 421, please? A. Yes.

Q. You testified with regard to this exhibit that you could not precisely give the date when your new production facilities were in operation, but that it was sometime around a month or so after May 22, 1929. Do you recall that? A. Yes.

Q. Isn't the reference in the first paragraph of Exhibit 421 to your changing your price list, a reference to a change in your price list so far as it affected orders for patented board which you might thereafter produce? A. Yes, sir.

Q. And you understood at that time, did you not, that the price bulletins which you had received from the licensor up to June 21, 1929, applied only to patented board

4412 manufactured by your company? A. Yes.

Q. But is it the fact that prior to the time that you got into production, your company was nevertheless taking orders for patented board which you expected very shortly to produce yourselves? A. That is correct.

Q. And this Exhibit 421, and the reference to prices therein, is a reference to the prices which you were quoting for the patented board which you hoped to sell after you got into production? A. Yes.

Q. Of course, you are not sure as to whether or not by June 21, 1929, you were not, as a matter of fact, already in production, are you? A. We may have been at that time. We did it as quickly as we could.

Q. But at any rate, prior to the time that you got into production, and after you took the license, you did take

orders for patented board for future delivery? A. That is correct.

Q. Now at the June 6, 1929, meeting in Chicago, there was some reference to the proposed bubble or foam license, was there not? A. Yes.

4413 Q. And do you recall what you did, if anything, after that meeting, with respect to taking the matter up with your lawyer? A. Well, as I recall it, the proposed contract had been sent or was sent either just before June 6th or just after June 6th, and as soon as we got it we sent our copy immediately to our lawyer.

Q. And by June 6th nothing had happened, you had not heard from your lawyer, which was the reason for the inquiry made by Mr. Henning at the June 6th meeting, wasn't it? A. That is right.

Mr. Steffen: I think that should be—if he knows. I don't see how he can state what Mr. Henning's reason was.

Mr. Bromley: Well, I thought the exhibit showed that Mr. Henning said he hadn't heard from the proposed licenses which had been sent out to the various licensees, and wanted to know what they were doing, if anything, about it.

Justice Stephens: Which exhibit is that—are you still on Exhibit 421?

Mr. Bromley: Exhibit 420, I think it is.

Will you show the witness Exhibit 420, please?

(Thereupon, Government's Exhibit No. 420 was handed to the witness.)

Justice Stephens: I am not sure that I get the point. Will you read the question and answer?

4414 (Thereupon, the record was read by the reporter, as requested.)

Justice Stephens: This letter is dated June 21, 1929—Exhibit 420. It has nothing to do with June 6th.

Read the previous question, the one to which objection was made.

Mr. Steffen: The one that the reporter read is the one to which I objected.

Justice Stephens: I am sorry, I seem to be lost.

Mr. Steffen: I said "if he knows". This witness couldn't have known what Mr. Henning's reason might have been for raising the question concerning bubble board, as far as I can determine, and I would like to have the witness

simply answer if he knows that that was Mr. Henning's reason.

Justice Stephens: Do you wish to be heard, Mr. Bromley?

Mr. Bromley: No. I had better start over again. I was under the impression, although I have lost the reference—that there was testimony indicating that Mr. Henning seemed to be in a hurry to get the bubble license agreement signed by Ebsary, or a question along that line.

Do you recall that, Mr. Lenci?

The Witness: There was a question of that kind, yes.

By Mr. Bromley:

Q. Now isn't it the fact that after June 6, 1929, after the June 6, 1929, meeting, that you referred the draft
4415 of the bubble board license to Mr. Rippey for consideration? A. Yes.

Q. And you heard nothing from him, at least up to June 21, 1929, because on that date you wrote him a letter asking him about it, Exhibit 420, didn't you? A. That is right.

Q. And you did that among other reasons because you wanted to be able to be entirely familiar with the situation when you got to Chicago on June 26, 1929, if you should be asked any questions about it? A. That is right.

Q. Now do you recall that in connection with Exhibit 420—

Mr. Steffen: (Interposing) I don't think there is any evidence that he was there at the June 26th meeting. Isn't that calling for facts not in evidence?

Mr. Bromley: I haven't said that he was.

Mr. Steffen: The question assumed that he wrote to Judge Rippey on June 21st in order to have information, I think you said, at hand when he attended the meeting on June 26th.

Mr. Bromley: In expectation of attending that meeting. It is shown by the letter that he expected to be there.

Justice Stephens: I think that is clear.

Justice Jackson: That is just a paraphrasing of
4416 the words in the letter.

By Mr. Bromley:

Q. Do you recall that at or about this time Judge Rippey informed you that he had had a talk with Mr. MacLeish, and that Mr. MacLeish had told Mr. Rippey that your company should decide whether or not they wanted

to take this license before any consideration was given to the form of it?

Mr. Steffen: I object to that as hearsay, and not proper cross examination.

Justice Stephens: Read the question.

(Thereupon, the pending question was read by the reporter.)

Justice Stephens: You are asking that not for the truth of the statement, but as a circumstance indicating the reasonableness of this witness' conduct?

Mr. Bromley: Yes.

Justice Stephens: The objection is overruled.

Mr. Bromley: Will you read the question again?

(Thereupon, the pending question was reread by the reporter.)

The Witness: Yes.

By Mr. Bromley:

Q. And you thereafter did decide to take the bubble license, did you? A. We did.

4417 Q. And it was signed on or about October 18, 1929, wasn't it? A. Yes.

Q. Now in connection with the negotiation and execution of that license, did you have any understanding with any one that you would take the license in order to induce USG to purchase the so-called starch patents of Haggerty and Hite? A. No.

Q. Can you recall when you first heard that USG had bought the Haggerty and Hite patents? A. No, I don't. It was sometime prior to October of 1929, that is as near as I can place it.

Q. And in connection with those patents were you ever a party to an understanding or agreement, or did you have any knowledge of any, whereby it was agreed among some or all of the gypsum manufacturers that they would, in the future, consider the use of the starch adhesive for bond as falling within the scope of the Haggerty or Hite patents, whether it did or not?

Mr. Steffen: I object to that, your Honor, as completely outside the direct examination, and it hasn't any basis or bearing to show the state of mind of Mr. Lenci.

Mr. Bromley: I can only say that it is charged in the complaint that as a part of the execution of the license

which he has examined this witness upon, Exhibit
4418 11, the starch-foam-bubble license—there was an extraneous understanding to the effect which I have just mentioned.

Justice Stephens: Well, I understand that, but the objection here, Mr. Bromley, is that this ought to be brought out as a part of your case and not on cross examination because not covered by the direct. Now how do you connect it with the direct examination?

Mr. Bromley: Well, I only connect it because he has examined this witness about the exhibit concerning which it is charged there was an extraneous oral understanding.

Justice Stephens: Which exhibit is that?

Mr. Bromley: Exhibit 11. I appreciate that he has not examined about this oral understanding, and my position must be that I am entitled to go into it although he didn't mention it, simply because he went into the written license, and it seems to me that that is proper cross.

Mr. Steffen: We have no recollection of having made any examination on Exhibit 11 which would admit of this type of cross examination, or any examination at all with respect to Exhibit 11.

Mr. Bromley: You can see right in the memorandum of the June 6th meeting, and the testimony with respect to it, counsel for the Government asked questions as to whether Henning wasn't trying to hurry these people up to get them to sign Exhibit 11.

4419 Justice Stephens: Asked questions of this witness?

Mr. Bromley: Of this witness, yes, sir, and I refer particularly to page 4163 of the transcript, at which point questions were asked about the June 6th meeting and the bubble license—and the bubble license is Exhibit 11.

Mr. Steffen: He is now going, your Honor, into the Hite and Haggerty patents, which we were not discussing at all. They had to do with starch.

Mr. Bromley: But they were covered by Exhibit 11.

Mr. Steffen: A lot of other things were covered by Exhibit 11 which haven't any bearing upon our examination.

Mr. Bromley: Perhaps I can get at it this way. Does the Government withdraw the charge—

Mr. Steffen: (Interposing) We do not withdraw the charge.

Justice Stephens: What charge? Let Mr. Bromley finish.

Mr. Steffen: Any one that he asks.

Justice Stephens: That won't help the Court much. I want to know what Mr. Bromley is asking. He was asking whether you withdraw the charge, or a charge, and you interrupted him. Complete your statement, Mr. Bromley.

Mr. Bromley: Does the Government now withdraw the charge that in connection with the execution of the foam-bubble board licenses there was an extraneous oral understanding among the licensees, with the licensor,
4420 that they would all consider the use of adhesive for bond as falling within the scope of the Haggerty and Hite patents, whether it did or not?

Mr. Steffen: I distinctly do not, your Honor, and I am surprised that the question should ever be asked.

Mr. Bromley: On page 4186 he asked the witness about these very starch patents.

Justice Jackson: What did he say?

Mr. Bromley: (Reading)

"Q. At the June 6th discussion was there anything brought up about the Hite and Haggerty patents, do you recall? A. I don't think so, I don't remember that at all.

"Q. Do you know what I mean by the so-called Hite and Haggerty patents? A. Yes.

"Q. The Haggerty patent is the patent that has starch in it? A. That is correct.

"Q. And you have no recollection of a discussion at the June 6th meeting concerning the Hite and Haggerty patents? A. No."

Justice Stephens: Are the Hite and Haggerty patents the patents covered by Exhibit No. 11?

Mr. Bromley: Yes, among others.

Justice Stephens: Where is the examination of
4421 this witness on Exhibit 11?

Mr. Steffen: There was none, your Honor.

Justice Stephens: Well, I understand that there is a dispute between counsel concerning that, and I am trying to find out whether there was or not.

Mr. Bromley: At page 4163. It starts at the bottom of page 4162.

Justice Garrett: That relates to the bubble patent.

Mr. Bromley: The bubble license, Exhibit 11, yes, sir.

Justice Stephens: Well, the Haggerty and Hite patents are starch patents, aren't they?

Mr. Bromley: Yes, and they are licensed under Exhibit 11, as well as the Roos patent.

Justice Stephens: Both the bubble and the starch patents are included in that exhibit?

Mr. Bromley: Yes, sir.

Mr. Steffen: That is correct.

Justice Stephens: Do you contend that the Government made any examination of this witness in respect of the Hite and Haggerty patents?

Mr. Bromley: Yes, sir.

Justice Stephens: At what point?

Mr. Bromley: At page 4186.

Mr. Steffen: I think, your Honor, that that testimony which has been referred to on page 4186 simply
4422 has to do with whether or not at the June 6th meeting there was anything said about the Hite and Haggerty patents, and the witness said that he didn't remember that there was, and the discussion ended there. There was no examination upon Exhibit 11, no examination as to the Hite and Haggerty patents.

The witness simply said that there was no discussion as to those at the June 6th meeting, and that ended it. If he wanted to cross examine—if there had been any discussion at the June 6th meeting—as to that matter, it would be, under the Federal rules, proper. But to take it to the June 26th meeting, and all subsequent meetings, and to go into a general discussion of Exhibit 11, is completely beyond the scope of our examination.

Justice Stephens: The examination of the witness, on page 4186, does not seem to include a reference to this exhibit, Mr. Bromley.

Mr. Bromley: No, it does not.

Justice Stephens: Read the pending question, please.

(Thereupon, the pending question was read by the reporter, as follows:

"Q. And in connection with those patents were you ever a party to an understanding or agreement, or did you have any knowledge of any, whereby it was agreed among some or all of the gypsum manufacturers that they would, in the future, consider the use of the starch adhesive
4423 for bond as falling within the scope of the Haggerty or Hite patents, whether it did or not?")

Justice Stephens: Well, the point seems to be a very close one, but we are inclined to view that the defendants

are entitled to examine the witness in respect of the bubble patents in the form that the question was asked; but not, Mr. Bromley, with respect to the Hite and Haggerty patents, because this witness wasn't examined in respect of Exhibit 11, on the Hite and Haggerty patents.

We do not foreclose you, however, from cross examining with respect to the testimony appearing at page 4186, where the witness said, in answer to the question:

"Q. And you have no recollection of a discussion at the June 6 meeting concerning the Hite and Haggerty patents? A. No."

You are not foreclosed, of course, from examining, on cross examination, as to whether he had a recollection at any other time on that subject.

The objection is sustained in part to the extent indicated, and overruled in part to the extent indicated.

Mr. Bromley: I feel that I haven't stated my position very clearly about the matter, and I would like, if your Honors will permit me, to say this.

The Government examined about Exhibit 419 for identification, which contained Mr. Lenci's notes of the
4424 June 6th meeting; and the very first item, you will see, refers to these bubble board contracts.

Now as I understand the Government, while they somewhat tentatively admit that a price fixing patent license, if done by a single trader, is lawful, as I understand their position it is, among other things, that our license contracts were unlawful because they were somehow arrived at as a result of concerted action taken at a meeting.

In the complaint they charge that there were a great many side understandings arrived at at these meetings, which themselves rendered the license contracts a subterfuge and a sham and unlawful.

Where Government counsel examines a witness about one of these meetings at which these license agreements were discussed, it does seem to me that I ought to be able to ask the witness on the stand who has testified, although it was very briefly, about the fact that this bubble license was discussed at the meeting, that I ought to be able to ask him any question with respect to whether or not any so-called understandings, outside of the contract, were reached or were not reached, because when my friend comes to the argument he is going to argue that there was something wrong about these license agreements because they were discussed at a meeting.

The complaint charges, in very great detail, just what the Government alleges transpired among these
4425 people by way of sub rosa agreements.

I had thought that the right to cross examine was very broad, springing from the mere fact that the Government has opened up this June 6th meeting, as well as the subsequent meetings, which had to do with the negotiation and final execution of these license agreements which they so vigorously attacked.

Justice Garrett: I don't suppose, Mr. Bromley, that you would concede that up to now the Government has made any proof respecting the Hite and Haggerty patents that would support the allegations of the complaint, would you?

Mr. Bromley: No, sir, I don't think they have, but I think they may argue—

Justice Garrett: (Interposing) Then you are fighting something—

Mr. Bromley: (Interposing) I may well be, I may well be fighting a shadow, but I think they will argue that from the fact that these matters were discussed, as they interpret the testimony, at meetings, they became illegal.

Now I agree with your Honor, I don't see how, up to this moment, they can argue that they have produced any evidence that there was any sub rosa agreement to consider the use of adhesive for bond as falling within the scope of the Haggerty and Hite patents.

Mr. Steffen: I think this is now getting the matter
4426 into the record in another way, by argument.

Mr. Bromley: My statement is not testimony—I wish it were.

Justice Stephens: There is no testimony on the subject. Do you wish to be heard, Mr. Steffen?

Mr. Steffen: I have to be heard. Mr. Bromley has now got us into a "tentative" concession regarding the single trader doctrine. We make no tentative concession as to that.

The single trader doctrine is referred to, and it is referred to as coming up in the Colgate case, but we make no concessions on that score.

On the matter of what is the proper scope of cross examination, I think that Mr. Bromley is limited, as Rule 43.(b) provides, to the scope of our examination, and our examination, I think, opened up certainly the question as to whether at the June 6 meeting there was any dis-

cussion of bubble board, and I think that in so far as Mr. Bromley wishes, he can cross examine at length on bubble board.

The only point that we have at all as to the starch patent occurs at page 4186, and all that the witness said was that there was no discussion of the Hite and Haggerty patents at that meeting.

Justice Jackson: I was just wondering, Mr. Steffen, where, if one side, as the Government has in this case, opens up a meeting, and has a witness on the stand
4427 who purports to tell everything that occurred at that meeting, why adverse counsel cannot ask whether or not other things were discussed or were not discussed.

Mr. Steffen: At that meeting, yes, we would be glad to have that, but I don't think that opens up the whole sweep of negotiations in the next ten years. If he wants to stay with the June 6th meeting, fine.

Justice Jackson: Or at any other meeting wherein this witness testified that this was discussed.

Mr. Steffen: At any other meeting where he raised that topic. The Federal rule on cross examination is fairly strict—

Justice Jackson: (Interposing) Oh, yes.

Mr. Steffen: (Continuing) —that you may not go beyond the bounds of the direct, and it is perfectly open to Mr. Bromley to bring on Mr. Lenci as his own witness at the proper time.

Justice Stephens: Well, the Federal rule on cross examination is strict in the sense that the Federal rule is not the old English rule that you could examine on anything charged in the complaint, or cross examination on anything charged in the complaint, within the issues.

At the same time the application of the rule as to what constitutes cross examination within the scope of the direct, inevitably involves, to a certain extent, the
4428 discretion of the Court.

Judge Jackson and I, in view of the further discussion with reference to Exhibit 419, are of the view that it is not improper for the defendants to cross examine this witness as to what happened at both the June 6 and June 26 meetings, or at any other meeting—

Mr. Steffen: (Interposing) He wasn't at the June 26th meeting at all, and he testified as to that.

Justice Stephens: I had understood you to admit that he was.

Mr. Steffen: No, we didn't say that.

Justice Stephens: Did this witness not testify about the June 26th meeting, Mr. Bromley?

Mr. Bromley: As I remember it, he said he was at "other meetings", the dates of which he could not remember, and that appears at page 4201.

Justice Jackson: He said he did not attend the March 17th meeting—I remember that. Isn't that correct, Mr. Lenci?

The Witness: That is right.

Justice Stephens: Well, it seems to me frankly, gentlemen of the Government, that it is cutting it too fine, unfairly fine, as against the defendants, to restrict the cross examination as narrowly as you insist. Certainly you are relying upon the testimony of this witness concerning the bubble patents, and the Hite and Haggerty pat-
4429 ents, to the extent that he gave any. He has testified that he attended the June 6th meeting. Whether he attended the other meeting he doesn't know, but he testified that he went to some other meetings.

We will take the noon recess and consider it during the recess.

(Thereupon, at 12:15 o'clock p.m., a recess was taken until 1:45 o'clock p.m. of the same day.)

4430 AFTERNOON SESSION

(The trial was resumed at 2:00 o'clock p.m.)

Justice Stephens: Since these questions of the proper scope of cross examination seem to be constantly arising, we have gone into this matter with some pains, and I will try to state very briefly the understanding of the law as we have it, so that counsel may be guided in the future, and perhaps time will be saved.

We understand that the distinction between the so-called American, or Federal, and the so-called English rule, is that the English rule permits cross examination on any subject within the issues, whether or not it was gone into on direct examination. That is not the American or Federal rule. The Federal rule limits the cross examination to the scope of the direct. But that means the subject of the direct examination, it means the topics gone into on direct examination, and inferences to be drawn, as well as explicit statements, from the direct examination.

Cross examination within the subject of the direct examination is a matter of right, and it is error to deny it. The extent to which it may go is discretionary.

What involves the subject of the direct examination of course is, to a certain extent, inevitably discretionary. Except where time is of the essence of an issue, the topic or subject, rather than the mere date on which it was
4431 discussed, is of primary importance.

The rules are as well stated, I think, and in as succinct form as they can be, in Jones on Evidence, Volume 3, Fourth Edition, Section 821.

I will not read the whole of the section, although I will ask the court reporter to copy it as the basis of the ruling of the Court. I will refer to one or two sentences which particularly apply to the situation we have here.

(Section 821 of Jones on Evidence, Volume 3, Fourth Edition, is as follows:)

Relation of Cross Examination to Direct Examination.—The American rule does not require that the cross examining counsel be confined to the phases of a subject that have been introduced in the direct examination. Where a general subject has been entered upon in the examination in chief, the cross examining counsel may ask any relevant question on the general subject; he is not bound to follow the line of examination pursued by the adverse party. Even as to matters which are purely defensive, some of the authorities hold that it rests in the sound discretion of the court to allow the defendant to cross examine the plaintiff's witnesses. Although there are instances in which it has been held to be error in a civil action to allow cross examination as to matters which are not connected with the examination in chief, yet the prevailing rule is that very much must be left to the discretion
4432 of the presiding judge in the determination of this question. It has been said: "Unless a trial court shall so far overstep the bounds as to admit that in cross examination which clearly has no connection with the direct testimony, an appellate court would not be justified in reversing a judgment for such cause, especially where the cross examination is upon facts competent to be proved under the issues in the case."

However, the rule limiting the inquiry to the general facts which have been stated in the direct examination must not be so construed as to defeat the real objects of the cross examination. One of these objects is to elicit the

whole truth of transactions which are only partly explained in the direct examination. Hence, questions which are intended to fill up designed or accidental omissions of the witness, or to call out facts tending to contradict, explain or modify some inference which might otherwise be drawn from his testimony, are legitimate cross examination. Even in those states where the American rule is applied, it has been frequently held that, in cases involving fraud, the general rule may be properly relaxed in the discretion of the court.

Although the court may exercise a reasonable discretion in regulating or limiting the cross examination, yet it is clearly error to exclude cross examination upon subjects which have been included in the examination in chief. So far as cross examination of a witness relates either
4433 to facts which are in issue or facts which are relevant to the issue, it may be pursued by counsel as a matter of right.

It is not an uncommon practice for the cross examiner to call for a repetition of the statements which have been made by the witness on direct examination. Although such a course of examination generally confirms and strengthens the testimony of the witness, it is permissible, and occasionally develops a conflict of testimony.

Justice Stephens: Now applying that to the situation which we have before us at pages 4162 and 4163, this witness testified that at the May meeting the advantages of the bubble system or process were explained, and then, subsequent to that, the United States Gypsum Company had sent Ebsary and the other licensees the license agreement covering the use of the bubble process.

At page 4163 the witness testified that his recollection was that that was sent between the May meeting and the June meeting, which was the reason, as he said, for the memorandum here that the bubble board contracts were to be considered by various counsel, that is the memorandum, Exhibit 419 for identification.

Now the bubble board contracts which were the subject of the witness' testimony, were not merely bubble board contracts, they were Hite and Haggerty patent contracts also—

4434 Mr. Steffen: (Interposing) Not at that time, your Honor.

Justice Stephens: Please don't interrupt me, Mr. Steffen. Give me an opportunity to state my views once, and then I will hear you again, if necessary.

Mr. Steffen: Yes, your Honor.

Justice Stephens: Exhibit 11, which was signed apparently on the 18th of October, 1929, and is the bubble board contract, is, as we read it, also the Hite and Haggerty contract. Both of these patents are referred to therein, and are the subject-matter of that license agreement. It seems to us, therefore, that the testimony of Mr. Lenci on direct examination goes to the negotiations and representations and discussions between the parties with reference to the adoption, ultimately, of those contracts, and that the mere fact that he didn't mention or remember, as he says on page 4186 that he did not, a discussion of the Hite and Haggerty patents, does not forbid cross-examination on the whole subject of the negotiations since they entered into a contract with respect to both the bubble board and the Hite and Haggerty patents.

Now those are the views of the majority of the Court, and that the cross-examination is therefore proper.

Judge Garrett, I think, is of a different view with respect to the examination, so far as it touches the Hite and
4435. Haggerty patents, of this witness.

Justice Garrett: I am of a different view, but I do not complain of the admission of it under the discretionary authority of the Court.

Justice Stephens: The objections are therefore overruled. You may proceed.

Thereupon, GEORGE N. LENCI the witness on the stand at the time of the recess, resumed the stand and was examined and testified further as follows:

Mr. Bromley: Will you read the pending qusetion?

(Thereupon, the pending question was read by the reporter, as follows:

"Q. And in connection with those patents were you ever a party to an understanding or agreement, or did you have any knowledge of any, whereby it was agreed among some or all of the gypsum manufacturers that they would, in the future, consider the use of the starch adhesive for bond as falling within the scope of the Haggerty or Hite patents, whether they did or not?")

Mr. Steffen: I object to the question, your Honor.

Justice Stephens: Do you wish to be heard further?

Mr. Steffen: As to the form of the question, yes. I of course have objected to it as not being proper cross-examination, but I abide by your Honor's ruling on that.

4436 Justice Stephens: You are entitled to your exception, of course.

Mr. Steffen: Now as to the form, I think the form of the question is faulty. It goes into questions as to whether there was an adhesive bond faculty in this starch patent, and whether it has that feature or not is a matter not in evidence. It is an involved and not easily understood question.

Justice Stephens: Can you rephrase your question to eliminate that objectionable feature, or do you insist upon it?

Mr. Bromley: It seems to me vital since I am only attempting to ask him whether or not he had an understanding.

Justice Stephens: Read the question again which he is objecting to.

(Thereupon, the pending question was reread by the reporter.)

Justice Jackson: The question seems to me quite involved, Mr. Bromley. It isn't clear to me.

Mr. Bromley: I will withdraw it and start over again.

By Mr. Bromley:

Q. Did you have any understanding or agreement with anyone that in the manufacture of gypsum board under the so-called foam license, the licensees would consider the use of adhesive to secure bond as falling within the scope of the Haggerty and Hite patents?

Mr. Steffen: I object to that still, upon the ground

4437 that there is nothing that I know of in the record, and certainly nothing in the direct examination here, about adhesive to secure bond. I don't know what he means.

Mr. Bromley: That was all covered by the testimony of Mr. Holland and Mr. Whittemore who explained just how starch was used, and how it was vital in the manufacture of board in order to secure the bond between the paper and the gypsum core.

Justice Stephens: The objection is overruled.

Justice Jackson: Do you remember the question?

The Witness: I would like to have it asked again, please.

(Thereupon, the pending question was reread by the reporter.)

The Witness: No, sir.

By Mr. Bromley:

Q. It is the fact, isn't it, Mr. Lenci, that your company was anxious to get into the production of board under the foam or bubble patents, prior to the effective date of your contract? A. Yes.

Q. And you sought permission from the licensor to use these patents prior to November, 1929, did you not? A. Yes.

Q. And you were told by USG that you could not have that permission because the transaction was subject
4438 to the approval of seven or eight Federal courts in the Middle West so far as the transfer of title of the Haggerty patent was concerned? A. Yes.

Q. And you did not get into production of this patented bubble-starch board until on or after the first of November, 1929, did you? A. That is right, it was very shortly after that date.

Mr. Steffen: I object to the answer, your Honor, if by that he is to testify that he was making a board that was satisfied by the terms of the patents. If he is speaking just generally that it was his understanding that they were making such a board, that is O. K.

Justice Stephens: The Court will not construe the answer to be binding as to the question of whether or not the board was technically within the patents. That is what you had in mind, isn't it?

Mr. Steffen: That is correct.

By Mr. Bromley:

Q. Now I should like to ask you some questions with respect to the operations of the Ebsary Company under the USG license.

Could you tell the Court briefly what factors are involved in price, other than the usual dollar amount, if any?

Mr. Steffen: I object to that as so far it is too
4439 generalized at the moment, as to "what factors are involved in price." If he wants to get it to a particular product at a particular time, I will still object, I think, on the ground that it calls for a conclusion.

Justice Stephens: Read the question.

(Thereupon, the pending question was read by the reporter.)

Justice Jackson: Do you understand what that means?

Justice Stephens: Do you understand the question?

The Witness: I think I know what he means, yes.

Justice Stephens: It seems to me that the question is not improper, Mr. Steffen, for the reason that the direct examination went very fully into the practices of the Ebsary Gypsum Company under the license agreement with respect to basing points, areas, the size of truck loads, carload lots, stop-over charges, switching charges, and the like, and as I understand it, the contention of the Government is that those are beyond the limitations of price fixing under the General Electric case, and are not within the reasonable protection of the patent monopoly.

Aren't the defendants entitled by cross-examination, if they can, to bring out that those practices do have some relation to price? Isn't that what you are trying to bring out, Mr. Bromley.

Mr. Bromley: Yes, sir.

4440 Mr. Steffen: I think, your Honor, that that calls for a legal conclusion. I think your Honors are going to have to decide, ultimately, whether the matter of standardizing board or telling the companies as to how they are to assume switching charges, and matters of that sort, are not largely matters of regulation, and not of price.

I think it is obvious so far that the defendants have attempted to stretch this price term just to the limit, and it isn't for any witness—and I think Mr. Lenci is as competent as any—to give the legal result as to whether or not a particular function is price, or whether it is regulation. That is for this Court to determine.

Justice Stephens: Well, that is quite true, we will have to determine eventually whether these regulations are within or without the proper limitations of the General Electric doctrine, but the direct examination went into the reasonable basis and business reasons for all these practices. If an additional business reason, in the view of this witness, was that they had some effect on price, or price protection, or price control, isn't that proper cross-examination since you went into that subject yourself?

Mr. Steffen: I have no objection to Mr. Bromley going into that subject at all. I object to having this witness say that this is price. I think he can ask this witness what

4441 he did and why he did it, and whether it was for business reasons, and as to whether they were good business reasons. But I object strenuously to permitting the witness to state a conclusion.

Justice Stephens: Judge Jackson has doubt as to what the question means. I think that we are all agreed that the line of examination which you are apparently entering into is a proper line of examination. Perhaps you can rephrase this question so that it will satisfy Judge Jackson's doubt a little bit, as to its meaning.

Justice Jackson: I haven't any doubt, I just don't understand the question. The witness thinks he does, however, and possibly the answer might clarify the question.

Mr. Bromley: I will withdraw the question and ask him this.

By Mr. Bromley:

Q. Isn't it a fact that many factors are involved in the price of gypsum board other than the actual dollar amount per thousand feet? A. Yes.

Q. For instance, if you were told that you could sell gypsum board at $13 per thousand square feet at your mill, would that enable you to operate as a commercial business matter? A. No.

Mr. Steffen: I object to that. How can the witness say whether he would be enabled to operate on a $13 price
4442 f. o. b. mill. What does he mean by "operate" or "be able to operate"—at a profit, or at a loss, or at $13 today, or tomorrow?

Justice Stephens: I understood the question to mean—was that a sufficiently practical definition or statement of price, or would it have to be attended by other limitations in order to make that price effective.

Mr. Bromley: That is what I meant.

Justice Stephens: Is there any objection to that?

Mr. Steffen: I don't understand what you mean by "to make that price effective".

Justice Stephens: To make $13 the price.

Mr. Steffen: As I get the question, Mr. Bromley starts out with a hypothesis that there is a $13 price f. o. b. mill, and from then on I am lost. I don't know what follows. Start with that, though, that suppose you had that price f. o. b. mill, today, I suppose, relating to gypsum lath.

Justice Jackson: That is just an arbitrary figure, I take it?

Mr. Bromley: That is all.

Justice Stephens: I think that the examination is entirely proper. It is, at any rate, obviously preliminary to a discussion of these various other factors which it is contended relate to price.

Mr. Steffen: We have no objection to his going into this line of questioning, but I think the questions ought to
4443 be intelligible.

Mr. Bromley: Can you answer the question?

The Witness: May I have the question?

Justice Stephens: The objection is overruled.

(Thereupon, the last question and answer were read by the reporter.)

By Mr. Bromley:

Q. In other words, you mean by that, that you would have to know whether that price applied to a large quantity or a small quantity, wouldn't you? A. Yes.

Q. And you would have to know whether that price applied to a situation where you were expected to make a free delivery, or whether the customer was to pay for the delivery, wouldn't you? A. Yes.

Q. Now you told us some time ago that in the gypsum industry for years, dealers were accustomed to pay a price made up of two factors, the mill price plus the cost of freight to destination, didn't you? A. Yes.

Q. Now a switching charge, to which reference has just recently been made, is a part of the freight charge made by the railroad, isn't it? A. That is correct.

4444 Q. For delivery by freight, by car? A. Yes.

Q. And if you were told by a licensor that your price that you must sell to a dealer at was the mill base price plus the carload freight, and you shipped to a customer where a switching operation was involved, if you bore the switching charge that would be cut in the price which the licensor had fixed, wouldn't it? A. That is right.

Q. It would be cut in the price in the same way that it would be if you bore the whole freight charge yourself? A. Yes.

Q. That is to say, if the price is made up of the price at the mill, plus the freight, then that price, instead of being $13, might be $14.50—and that is the price which the dealer is to pay you, is it not? A. At destination.

Q. At destination, yes. A. Yes.

Q. And that is the price which is fixed by the licensor in the bulletin to you? A. That is right.

Q. So that if you reimbursed him for a part of that $1.50, you would be selling the goods to him at less than
4445 $14.50, wouldn't you? A. That is right.

Q. And likewise, if you sold less than a carload

to a dealer, at this $13 mill price, that would be a cut of the price that was fixed in the bulletin for less than a carload lot, would it not? A. Well, on our less than carload lots there was a specified price at the mill.

Q. Yes. Now if you delivered less than a carload lot to a customer, at the carload price, that would be a cut in the less than carload price, wouldn't it? A. That is correct, yes.

Justice Stephens: I don't understand that. I should think that would be a cut in the carload price.

By Mr. Bromley:

Q. Well, Mr. Lenci, if you sell a man less than a carload of gypsum board, and the price for that is fixed at $15 per thousand feet, and if you give him the carload price, you would sell it to him at $13, wouldn't you? A. Yes.

Justice Stephens: I see what you mean.

By Mr. Bromley:

Q. And that would be less than the price which you should have charged? A. That is right.

Q. Most of these factors, of which I have spoken,
4446 are factors which involve the rendition of some kind of service to the dealer, do they not? A. Yes, they go beyond the mere freight item—they cover, in a great many cases, warehousing and truckload deliveries beyond that point.

Q. For instance, free trucking to a dealer-customer is a service to the customer, is it not? A. Yes.

Q. It is a service to the customer which is worth money to the customer? A. Yes.

Q. And it costs money to render it, doesn't it? A. It certainly does.

Q. So that it has been the fact, over the years, has it not, that when the licensor fixed a price for delivery by truck, that that price was generally higher, in terms of dollars per thousand feet, than the carload price was? A. It was until recent years.

Q. Well, it was until recent years for the reason that, if you delivered goods purchased by a dealer to that dealer in a truck at your cost, you were rendering him a service which was worth money to him? A. Yes.

Q. And if you made a truck delivery to a dealer,
4447 of gypsum board, and charged not the price that was set for truck delivery, but the price that was set

for carload delivery, that accommodation to him directly affected the price which he paid, and you realized, did it not? A. Yes.

Q. By the same token, if you deliver a small quantity of board to a dealer, say one thousand feet, instead of a carload to a dealer, the fact that you are willing to, and do, make frequent small deliveries to him constitutes a service to him which is worth money to him, doesn't it? A. The trucking item is much higher on a part load than it is on a full load, per square foot.

Q. And therefore, in the normal operation of your business, if you made small quantity deliveries by truck, you would expect to charge and receive more per thousand feet from any customer, wouldn't you? A. Yes.

Q. And if you had a price fixed for that, which defined a certain area within which you could make those deliveries, and you delivered to somebody outside of the area, at the price fixed for deliveries within the area, you would be serving that customer with a service which was worth more to him than it would be to people within the area, wouldn't you? A. Yes.

Q. Now was it the fact that you quickly found out, 4448 under the license agreement, that a licensee who lived up to the bulletin restrictions in good faith lost customers if another licensee violated the price provisions of the bulletins? A. Yes.

Q. And would you say that there are many ways of cutting the fixed prices, other than reducing merely the amount of dollars charged per thousand feet? A. Yes.

Q. Well, can you tell us some of those ways? A. Well, making small deliveries, or allowing very small pickups at warehouses; or making special arrangements with dealers for warehousing, and paying rent for warehousing in a dealer's warehouse. There are any number of ways. We made a great many complaints.

Q. Would granting an imaginary or unfounded damage claim be a way of making a rebate on the fixed price of board? A. Yes.

Q. Would it constitute a rebate on the price of board if you gave the purchaser other products for nothing? A. Yes.

Q. And would that same principle apply where you gave him other products at prices below prevailing market prices? A. Yes.

Q. Your memorandum of the first licensee meeting as I

remember it indicates that for the first two years
4449 or so after November, 1929, there were a great many violations, according to USG, of the minimum prices which it fixed on the patented board—is that right? A. Yes.

Q. And you have testified that Mr. MacLeish said that your company violated the license agreement 711 times in a two-year period, is that right? A. That is right.

Justice Garrett: The memorandum to which you refer was excluded, was it not?

Mr. Bromley: Yes.

Justice Stephens: But the witness did testify from his own recollection as refreshed by that, that there were a large number of violations charged by Mr. MacLeish, and that 711 applied to his company.

Mr. Bromley: And the memorandum that he used was Government's Exhibit 477 for identification, I think, being his notes.

4450 Mr. Steffen: I think the record should show, Your Honor, that we object to all this testimony as to violation of price terms, as being testimony having to do with a conclusion of law, whether it is a price term or whether it is a regulation of the industry in general.

Justice Garrett: As I understand, you are not asking for a ruling. You just want the record to show the objection.

Mr. Steffen: That is correct.

Justice Stephens: The record may show a continuing objection, and that it is overruled.

By Mr. Bromley:

Q. Didn't you find out, after you had been in operation under the license for a couple of years, that all kinds of ways were being devised by your competitors, either directly or indirectly, to violate the minimum prices that were set by the licensor? A. Yes.

Q. And you understood, did you not, that it was because of the great number of violations, and for the purpose of attempting to enforce adherence to USG's price bulletins, that Board Survey was formed? A. Yes, that was my understanding.

Q. You knew that Board Survey was a part of the
4451 USG organization, did you not? A. Yes.

Q. Did you or your company have anything to do with its formation? A. Nothing whatever.

Q. Did you have any interest in it of any kind, direct or indirect—I mean financial interest? A. Not financial or otherwise.

Q. And you had no voice nor any part in its management or operation, did you? A. No.

Q. And at no time did anybody from your company ever participate in its management or operation? A. No.

Q. And that is likewise true as to its organization, is it not? A. That is correct.

Q. And you understood, didn't you, Mr. Lenci, that the meeting of October 17, 1932, to which you have testified, was called by the licensor because of the licensor's contention that the licensees were guilty of almost wholesale violations of the price bulletins? A. Yes.

Q. And according to Mr. MacLeish, the number of violations of the price provisions on patented board ran into the tens of thousands of dollars, and the millions of
4452 square feet of board, did it not? A. Yes.

Q. Did I understand you to say that Mr. MacLeish mentioned all of the items to which you have testified as appearing on your notes, Exhibit 477 for Identification, or only some of them? A. It is my recollection that he mentioned all of them.

Q. And is it a fact that he did that by way of illustrating the more frequent ways in which these alleged violations were accomplished by the licensees, according to his contention? A. Yes.

Q. And such things as you testified to, as advertising allowances, and switching charges, and stop-over charges, and warehousing arrangements, Mr. MacLeish stated, did he not, were regarded by the licensor as rebates when employed in connection with the purchase and sale of patented board? A. Yes.

Q. And all of these things, if used for the purpose, were ways of cutting the fixed board prices, were they not? A. They were, yes.

Mr. Steffen: I object to that, Your Honor, as a conclusion. He is asking for a construction of the li-
4453 cense agreement from this witness, that this was a violation of the agreement.

Justice Stephens: How would you suggest that the defendants prove their defense except by questions like this?

Mr. Steffen: I would say, Your Honor, that this is distinctly not the way to prove their defense. They have the contract, as they have been telling us, in evidence. It has

been in evidence since last November. And the construction of the contract, with the facts before the Court, is for the Court. It is not for this witness to say, "We think that constituted a violation of the contract", and they don't need any further proof.

Justice Stephens: You see the problem of the Judges, Mr. Steffen. We try to make these rulings in a fair and equitable way, and to give both sides a full chance to prove their case. I don't understand this testimony to be coming in at all to prove what the license agreement was.

Mr. Steffen: The question was—"Do you regard this as a violation of the contract?"

Justice Stephens: Oh, no, he didn't say anything like that.

Read the question.

(The question was read by the reporter.)

Mr. Steffen: I am sorry, I withdraw my objection.

4454 Justice Stephens: Of course, we are not going to permit witnesses to tell us what these license contracts mean, but I don't see how the defendants can be forbidden from showing what, under their business explanations, were the reasons for these practices which you condemn as a pattern of price fixing, illegitimate under the terms of the General Electric case. It seems to me that it would be clear error to stop this type of examination.

You may proceed.

By Mr. Bromley:

Q. As I remember your testimony, you said that Mr. MacLeish, after going over these types of alleged violations, said many times that these practices would have to stop. Isn't it a fact, Mr. Lenci, that all he said was that these practices which he had listed and catalogued, in his opinion constituted violations of the minimum price bulletins on patented board? A. Well, he certainly did say that, yes.

Q. You also said, at page 4318, that he said only cash sales would be permitted. Didn't that statement to which you testified have reference to some question that was asked him as to the propriety of a company taking bonds of a customer corporation at their face value which, as a matter of fact, at the time they were taken, were worth only

4455 30 cents on the dollar? A. That question came up in connection with the Chicago Fair, and at the date of that meeting no one expected the Chicago Fair ever to

pay out on those bonds, and we felt that that was taking an unfair advantage to sell material and take bonds in payment, which bonds were not worth their face value, their par value. We thought that that was a rebate or a cut in price.

Q. Well, don't you now say that you were in error when you said that MacLeish said that you could only sell your goods for cash? There was no such requirement as that, was there, in the bulletins? A. Well, possibly I didn't mean cash, but I meant for the equivalent in dollars of the prices specified in the bulletins.

Q. Well, none of your sales, as a matter of fact, were for cash, were they, or very few of them? A. No, not in the strict sense, no.

Q. You always extended credit to your customers, and the bulletins permitted that, didn't they? A. Oh, yes.

Q. Now subsequent to this meeting of October 17, 1932, the Board Survey Company, at least until 1937, investigated complaints which were filed with it by various licensees against other licensees or the licensor, did it not?

4456 A. Yes.

Q. Will you look at the following exhibits, please: 438, and 447 to 450, inclusive, and 452 to 457, inclusive?

(Government's Exhibits 438, 447 to 450, inclusive, and 452 to 457, inclusive, handed to the witness.)

By Mr. Bromley:

Q. Would you say that these exhibits, Mr. Lenci, were examples of the kind of complaints which your company made to the Board Survey Company and which were considered by the Board Survey Company? A. Yes, they are.

Q. What is the fact as to whether or not all of your complaints with respect to alleged violations of USG bulletins, which you made to USG or to Board Survey Company, were limited to matters having to do with the price or the sale of patented gypsum board?

Mr. Steffen: We object to that on the ground that it calls for a conclusion as to what is meant by "price". I think that the question should be broken down into separate items so as to get the facts before the Court.

Justice Stephens: Read the question.

(The question was read by the reporter.)

Justice Stephens: We don't construe that question, and will not construe it, Mr. Steffen, as calling for a con-

clusion on the part of this witness that this board
4457 which he is asked about in the question was technically manufactured within the patent processes. What I understand the question is directed to, and my colleagues share my view, is the board which, in this witness' understanding, was being manufactured and sold by them under the patent, as distinguished from some other board.

Mr. Steffen: My objection didn't go to that point, although it appropriately might have gone to that point. I assume that Your Honors understood my objections on that score.

As I listened to this question, it seemed to me that Mr. Bromley is asking Mr. Lenci whether all of his objections had to do with matters of price under the bulletins or under the license agreements. Now when you ask that question—and it is undoubtedly in relation to these matters which we have been taking up, and probably some others which may be in the mind of the witness—you are asking for a construction of "price".

Now the license agreements provide that the licensor may fix the minimum price or prices, and under that contract stipulation they have issued all these bulletins; and they have construed it, or considered, perhaps, that whether it was price or not, they would make it look like price for purposes of getting within the contract.

Now when you ask the witness whether or not all
4458 of his complaints had to do with price, you are asking whether or not these complaints were properly within the price terms of the contract.

It seems to me that Mr. Bromley should ask him—"What did you do; what was your complaint about; was it about a rebate; was it about switching charges; was it about this, that or the other thing?"

With that all developed, then there is nothing further for him to talk about. It is for the Court then to determine whether that has to do with price or doesn't have to do with price as it comes up under the contract.

But when he asks a very omnibus question here which says, "Did all of your complaints have to do with price?" he is expecting to write into the record a conclusion by this witness that everything they ever did was a proper thing under the price terms of the contract, and that is a very obvious conclusion of law which it seems to me the Court must make and not the witness. It is very, I should think, improper cross-examination.

Justice Stephens: Well, the Court is certainly not going to conclude from this witness' testimony that he is testifying that these complaints were proper complaints in respect of price, because the question doesn't even include that term. It seems to me the objection that the question is of an omnibus character goes to its weight. You
4459 have a right to bring out on re-direct-examination, if you can, that he is mistaken when he says all the complaints went to price.

As I understand, the term "price" is not being used in the technical, legal conclusional sense—and it doesn't seem to me that the witness understands that it is—of what is proper under the General Electric case, but I thought the question was directed to bringing out whether or not the witness' complaints had to do with matters which, according to his understanding of the complaints, would affect the amount they would get paid for their product.

Isn't that what you are trying to find out about, Mr. Bromley?

Mr. Bromley: Yes, sir.

Justice Stephens: I don't think that is objectionable, and the objection is overruled.

The Witness: My answer is certainly "Yes" to that question.

Mr. Steffen: Your answer was to the Court's question?

The Witness: Yes, and Mr. Bromley's question,—Mr. Bromley's question with the Court's interpretation of it.

By Mr. Bromley:

Q. Now, it wasn't very often, was it, Mr. Lenci, that you secured evidence that some one of your competitors had made a sale at a dollar figure less than the
4460 prescribed mill base price? A. No, it was usually in the form of some special service or some concession of some kind.

Q. Would you say that what you usually found out about and what you were usually complaining about was some indirect price cut? A. Yes, a great many of these were cases of indirect price cutting.

At one time, on the record there, there was a complaint of cash rebates, but that wasn't the largest complaint. The largest complaint we had was this type of thing.

Q. When you say "this type of thing", you refer to the exhibits before you, the numbers of which I mentioned a little while ago? A. Yes.

Q. You felt that this indirect price cutting was as much of a price reduction as though the board had been sold at a figure less than the mill base figure, did you not? A. Yes.

Q. And you were perfectly sincere in making these complaints, weren't you? A. We certainly were.

Q. Did violations of this kind, during the years subsequent to 1929, mean much to your company in amount
4461 of business which you lost or which you felt you might otherwise have secured? A. Yes, they did.

Q. In other words, if one of your competitors violated his contractual obligations under the license and made an indirect price cut, that fact alone might mean the difference between your getting the business and his getting the business, is that right? A. It very definitely did.

Q. And in 1932, how important had this matter of violations of price bulletin terms by your competitors become? A. Well, it had become extremely important.

Q. And what can you tell us as to how you felt with respect to the extent to which it was affecting your own volume of business, if any? A. Well, if you will notice, a great many of our complaints are around the New York and New Jersey metropolitan territory, and we had a warehouse in New York and a mill warehouse in Newark, and those two operations were dependent upon this New York-New Jersey territory, and they were very seriously affected by the competition from the other companies, especially those named in these complaints.

Q. Is it true that generally speaking, a building supply material dealer will buy, from the manufacturer,
4462 products like gypsum board at the lowest price offered to him? A. Yes.

Q. As you said the other day, in 1932 and in 1933, the country was suffering from a very severe depression? A. Yes.

Q. Would you say that during those years particularly, business was hard to get for your company? A. It was extremely hard to get.

Q. And what is the fact as to whether or not there was a great deal of competition with respect to each new construction job as it came along, particularly during those years? A. Well, there was competition not only for every job, but for every carload and every truckload order.

Q. I take it, Mr. Lenci, that you felt your company was

living up to its contractual obligations under the license? A. We did, we took a great deal of pride in it.

Q. On the other hand, it is the fact, is it not, that your company was accused by your competitors of a very large number of violations during this period? A. We were.

Q. Wouldn't you say that your competitors were
4463 about as suspicious of you as you were of them? A. Well, I don't know what their state of mind was, Mr. Bromley.

Q. Well, it is the fact, isn't it, that over the years from 1932 to 1939, you complained a great many times, about the practices of your competitors, to Board Survey Company? A. Yes.

Q. And, of course, those complaints were limited, were they not, to licensees doing business in the area which you served with your products? A. Yes.

Q. And what is the reason that so many of these complaints seemed to have to do with the Kelley Plasterboard Company, can you tell us? A. Well, Kelley had a plant in Delawanna, which is quite close to the New York and Newark area where we were operating, it is within about 5 or 6 miles of our Newark plant, and they were very aggressive in the New York-New Jersey markets; and you can see from the nature of these complaints that they had men out on commission, and jobbing arrangements, and also they made a great number of sales through the Structural Gypsum Division.

Q. Would you say that Kelley was one of your most vigorous competitors? A. Yes, I would say—I
4464 would like to modify that, I would say that he was one of our most troublesome competitors.

Q. What about the Certain-teed Company? A. They, at that time, were not active in that area.

Q. Was there a time when they were a vigorous competitor of yours in that area? A. Not for any long period, no.

Q. What was another vigorous competitor, in that area, of yours? A. The United States Gypsum Company and the National Gypsum Company were both active there.

Q. Now, there was nothing secret about these complaints, was there, Mr. Lenci, so far as you were concerned? A. Not a thing.

Q. And you meant what you wrote to Board Survey, didn't you, when you complained? A. Yes, we certainly did.

Justice Stephens: The Court will take the afternoon recess at this point.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

Justice Stephens: Proceed.

By Mr. Bromley:

Q. Will you look at Exhibit 438, please?

In the first paragraph of that letter, Mr. Lenci,
4465 you were complaining merely that a discount was being given to jobbers by some licensee, were you not? A. Yes, that should have been stated in there.

Q. What you said was "Referring to the recent bulletin of the United States Gypsum Company advising the licensees that selling through Jobbers had been eliminated."

You knew when you wrote that that all the bulletins had done was level off the price as between jobbers and dealers, didn't you? A. That is correct. It is merely shortened up there, because that is the way I understood it, and everybody else understood it the same way.

Q. Well, what is the way you understood it? A. The letter should have read, "advising the licensees that selling through jobbers at a discount had been eliminated".

Q. And when you said that you understood it, and that is the way everybody else understood it, you meant that they all understood that all that had been eliminated was the right of a manufacturer to sell a jobber at a discount, is that right? A. That is correct, yes.

Q. Referring to the second paragraph of Exhibit 348, what does that paragraph mean, Mr. Lenci? A. That means that Daniel Duskis, who was a dealer in Long Island,
was buying Certain-teed board through Orin F.
4466 Perry. Daniel Duskis is a dealer, and he certainly would not buy from Mr. Perry if Mr. Perry was paying Certain-teed the dealer's price, which would indicate to me that Perry was still getting a jobber's discount from Certain-teed.

Q. Then it is your testimony, is it, that in the second paragraph, you were complaining to Board Survey about a price cut on the part of the Certain-teed Company? A. Yes.

Q. And you were complaining specifically that, based on the evidence of what Duskis was doing, that is, buying board from Perry, you felt Certain-teed was giving Perry a

discount, which was prohibited by the USG bulletins then in effect; is that right? A. That is right.

Q. And you would admit, wouldn't you, that anyone unfamiliar with what you were talking about would not be able to say right offhand whether that paragraph was a complaint against Duskis or a complaint against Perry or a complaint against Certain-teed? A. They might not, if they were not familiar with the background.

Q. But you have no doubt, have you, but what it was your intention and purpose to complain about the price which Certain-teed was charging Orin F. Perry? A. That is our complaint.

4467 Q. And you felt that that price which Certain-teed was giving Perry was a cut price in the sense that it was lower than the price which the bulletins fixed for sales to dealers and jobbers? A. Yes.

Q. The third paragraph contains a reference to a USG price bulletin establishing a $2.00 differential between board shipped in mixed cars and full cars, for the metropolitan New York area, does it not? A. Yes.

Q. Now the effect of that bulletin provision was merely to permit a licensee to charge a higher price on a smaller quantity purchase, wasn't it? A. Yes.

Q. That is, the differential of $2.00 was a price $2.00 a thousand higher where the sale which a licensee made was a mixed carload sale rather than a full carload sale, wasn't it? A. That is correct.

Q. And that is merely a way of saying that where a licensee sells a smaller quantity of board than a full carload, he must charge a higher price per thousand feet, under the bulletins, isn't it? A. Yes.

4468 Q. And, of course, if a licensee sold a mixed carload of gypsum products, there would be contained in that mixed carload a smaller quantity of board than would be contained in a full carload, wouldn't there? A. That is correct.

Q. Now in the third paragraph, you make reference to that bulletin provision establishing the $2.00 per thousand higher price for a quantity of board less than a full carload, and in the next paragraph you talk about what the Tisdale Lumber Company of Flushing had done, do you not? A. Yes.

Q. Now the Tisdale Lumber Company of Flushing was a what? A. They were a dealer.

Q. And they had purchased less than a full carload of board from the Structural people? A. That is right.

Q. But they had only paid for it, per thousand square feet, the carload price? A. That is right.

Q. Now against whom were you complaining in that paragraph? A. I was complaining against the Kelley Plasterboard Company.

Q. And what was your complaint against the Kelley Plasterboard Company? A. I was complaining that
4469 the Kelley Plasterboard Company must have made some concession to the Structural Gypsum Corporation, below the bulletin price, on this board contained in the mixed carload shipped to the Tisdale Lumber Company.

Q. Now, at the time you made that complaint, you had no evidence whatsoever as to what actually was charged by the Kelley Company to the Structural Company, did you? A. No, we had no access to that.

Q. You knew, however, that under the bulletin provisions Kelley must charge Structural the dealer price less a specified discount of 12-1/2 percent for lath, didn't you? A. Yes.

Q. You knew that much? A. Yes.

Q. That is to say, if the price for lath at that time was $13.00, the bulletin provided that Kelley must charge Structural the dealer price of $13.00 less 12-1/2 percent of $13.00? A. If it was in a full carload.

Q. If it was in a full carload? A. Yes.

Q. So that the only margin of profit for the Structural Company in that transaction was approximately
4470 $1.60 a thousand, or 12-1/2 percent of $13.00, wasn't it? A. That is right.

Q. Now, you found out that the Tisdale Company, a dealer, had bought, at the carload price, less than a carload quantity from Structural, did you not? A. That is right.

Q. And what did you conclude from that piece of evidence which you say you had? A. I concluded that the Kelley Company had not charged the $2.00 differential to the Structural Gypsum Corporation.

Q. And is that what you were complaining about in this paragraph of Exhibit 438? A. Yes.

Q. Now, the Tisdale Lumber Company, the dealer, of Flushing, New York, which had purchased this board from the Structural Company, was a prospective customer of yours, was it not? A. Yes.

Q. Under the USG bulletins, if you had sold 16,000 square feet of board to the Tisdale Lumber Company, you

would have had to charge that company the dealer's price fixed for less than carload lots in the bulletins? A. That is correct.

Q. So that Kelley's cut price to Structural resulted in Structural being able to take away from you the
4471 Tisdale Company, one of your prospective customers? A. That is right.

Q. And you felt that you were, therefore, being injured in your business by the violation, on Kelley's part, of the prices fixed for its sales by USG, didn't you? A. That is right.

Q. And you felt, didn't you, that you were losing customers which you might otherwise have sold, because of price concessions which Kelley was making to Structural and others, below the proper prices set for Kelley in the USG bulletins? A. That is right.

Q. Now, look at the 6th paragraph of this letter. That is, I believe, the second mention of the subject of exchanges, to which the Presiding Justice referred the other day.

Will you please explain to us why you felt, if you did, that this business of exchanges was an indirect violation of the price bulletin provisions? A. Well, the price bulletins at that time provided for a price for a 5,000 foot minimum pick-up, and it was our feeling that if these dealers, as they ran short of material, could constantly go in and pick up a few boards, and maybe return others in place of them, that they were getting a special service in there which was hurting the rest of us, and they
4472 were doing something which was not contemplated in the price bulletins.

Q. And when you say "they" were doing something, you mean the Kelley Company? A. I mean the Kelley Compan in this case, yes.

You see, Ebsary Gypsum Company naturally established a 5,000 foot minimum pick-up on the basis of the bulletins, and if any of our customers ran out of a certain size they would come to us and buy a new truckload, putting in a larger quantity of the size they ran short of, and we would get a truckload order. But if they could go up to Mr. Kelley's plant and take back a few boards that they didn't happen to need, and get a few more of a different size, we just lost that sale, and that was giving them a considerable amount of extra service without any extra charge, and was a price cut, price concession.

Q. Well, let's see if I understand it. Suppose I bought you a full carload of gypsum board at the carload price of

$30 per thousand. Now if I thereafter desired to buy from you a thousand feet of that same board, under your license you would have to charge me more than $30 per thousand feet, wouldn't you? A. Yes, there was no price set for a thousand feet.

Q.-All right. Say I wanted to buy 5,000 feet of board, under your bulletins you would have to charge me
4473 more than $30 a thousand, which was the full carload price per unit? A. That is correct, yes.

Q. And that is a normal business practice, isn't it, to charge less for a large quantity, per unit, than for a small quantity, per unit? A. Yes.

Q. There is nothing strange about that, is there? A. No.

Q. Now, if I took some of my board that I received in a full carload, and for which I paid $30 a thousand, and came around to your plant and exchanged it for 5,000 feet of the same kind of board, I would, in effect, be making a purchase of a small quantity at the carload price, wouldn't I? A. Yes.

Q. And that, in effect, would be a cut in the price, of $32, say, set for 5,000 foot quantities? A. That is right.

Q. Is that what this reference in the 6th paragraph, to exchanges, means? A. Yes.

Q. You looked upon the practice of permitting exchanges as an indirect price cut in the price of the small
4474 quantity exchanged, didn't you? A. That is right.

Justice Stephens: There is one phase of that type of transaction that I still don't quite understand. I understand now your point of view with respect to going in and buying 5,000 feet, which is a large amount. But I understood you to testify on your direct-examination by Mr. Knuff that there would be exchanges of a few boards made.

The Witness: That was in connection with exchanges between manufacturers.

Justice Jackson: That is not what you are talking about now?

The Witness: No, we are not talking about that now.

Justice Stephens: I see.

By Mr. Bromley:

Q. Well, let's talk about it. Suppose I am USG, and you are Ebsary. The same principle would apply, wouldn't it? If I took my own board and exchanged, for some of your board, a small quantity, that still might constitute a price cut in the small quantity of the board which you gave me, mightn't it? A. Yes.

Justice Stephens: That is for the reason, if I may inquire, that an exchange is a form of purchase, and therefore, if you exchange a small amount it would be outside the bulletin provisions?

4475 The Witness: Yes. And besides that, it is quite an expense to the person who has the warehouse to handle these small quantities. The trucks would come in at unexpected times, and they would demand this special service, and it cost just as much to invoice a dozen boards as it does a carload.

By Mr. Bromley:

Q. Now, following out the suggestion of the Presiding Justice, if I purchase board from you, I can either pay for it in money or in goods, can't I? A. Yes.

Q. And if I— A. (Interposing) Well, to clear up this thing, these exchanges between manufacturers were not really exchanges. We wouldn't take a certain number of our boards to the USG's warehouse and trade them for their boards. We would go to their warehouse and ask them to give us a few boards of a type we happened to be short of at that particular moment, and we would pay for them in the usual course of business. That is what we were asking them to permit us to do, and they said they could only do that if we would take a straight truckload, they didn't want us to come in there and pick up a few boards as a matter of convenience. In other words, they weren't anxious, any more than we would be, to help out the competitor.

4476 Justice Stephens: So you weren't using the word "exchange" in the sense of barter?

The Witness: No.

Justice Stephens: You were using the word "exchange" to describe a transaction whereby you purchased from some other manufacturer less than the amount prescribed in the bulletin, and they, in turn, purchased from you in a similar manner?

The Witness: That is right.

Justice Stephens: I got the impression you were talking about trading board for board.

The Witness: It was known as exchanges between manufacturers, but it was not a true exchange.

By Mr. Bromley:

Q. As a matter of fact, Mr. Lenci, you know, don't you, that at the time you wrote Exhibit 438, there was nothing

in the bulletins that prohibited this practice or bore on the practice at all? A. No, I don't believe there was.

Q. And all you did in this letter, Exhibit 438, was to ask the question? A. Yes.

Q. Now, do you know whether you ever got an answer? No answer is here among these letters. A. I don't think we did.

4477 Q. And you remember, don't you, that no provision was ever put in the bulletins about this subject, at any time? A. I don't think there was, I don't recall any.

Q. Now, will you look at Exhibit 447, please?

This letter of May 16, 1932, was a follow-up of Exhibit 438, wasn't it? A. Yes.

Q. You wanted Board Survey to take some action with respect to stopping the alleged Kelley violations, didn't you? A. That is right.

Q. And in addition, in Exhibit 447 you make some more complaints, do you not? A. Yes.

Q. In the second paragraph, do you see a reference to Dusol? A. Yes.

Q. Now what was that complaint? A. Well, that was a complaint that Dusol, who was their Brooklyn salesman, was offering the lumber dealers over there the right to come and pick up quantities of board from the Kelley Plasterboard Company less than the 5,000 foot minimum in effect at that time, but Kelley was charging them at the 5,000 foot price.

Q. So that he was selling board, at a price set for 4478 a large quantity, in small lots or quantities? A. Yes, that is right.

Q. And you considered that to be a violation of the price provisions of the USG bulletins? A. That is correct.

Q. And that is why you complained? A. Yes.

Q. Was that practice of the Kelley Company detrimental to your business at that time? A. Yes, very definitely.

Q. And did you lose, or were you afraid that you would lose, dealer-customers because of what Kelley was doing through its salesman, Dusol? A. Yes.

Q. Now in the fourth paragraph of that letter, what was the complaint against Kelley referred to there? A. That was a complaint that the Kelley Plasterboard Company was selling Robert S. Green, who was a dealer in Baltimore, board below the bulletin price. That was a straight complaint of a price cut.

Q. That was a straight complaint of a direct price cut, wasn't it? A. Yes.

Justice Stephens: What do you mean by "small board"?

The Witness: Gypsum lath. We usually spoke of
4479 the wallboard as big board, and the lath as small board.

By Mr. Bromley:

Q. And in the next paragraph you refer to the fact that your fear is that you are losing customers by these violations on the part of the Kelley Company? A. Yes.

Q. In Exhibit 449, you were complaining about Kelley again, were you not? A. Yes.

Q. In the fourth paragraph, you are referring to a situation in which one of Kelley's salesmen is splitting his commission, and therefore giving a rebate to the purchaser on board, are you not? A. Yes.

Q. And that is made clear, is it not, in the last sentence of that paragraph: "We believe that the only way L. A. Dusol can work on this basis is through some split with George Dusol who is working as a salesman for the Kelley Plasterboard Company."? A. That is right.

Q. You believed at that time, did you not, that Dusol was a commission salesman of Kelley? A. Yes.

Q. And so far as you know, he was? A. I believe he was.

4480 Q. And your charge was that the price which Kelley was charging to its customers was indirectly cut below the stipulated figure by a refund, by this salesman Dusol, out of his commission, to the customer? A. That was our complaint.

Justice Stephens: Do you mean by that, by a "split commission", that the salesman for Kelley who was working on a commission basis, would therefore get paid a certain number of dollars as a commission on a sale, and would take some of those dollars and give them over to the dealer?

The Witness: That is right. You see, the dealer was his brother.

Justice Stephens: That would, in effect, reduce the price to the dealer?

The Witness: That is right.

By Mr. Bromley:

Q. In connection with that question, Mr. Lenci, the use of commission salesmen by licensees, in connection with

their board sales, gave rise to a great many abuses, in the period from 1929 to date, didn't it? A. Yes.

Q. You referred, in your answers to the questions just asked you by the Presiding Justice, to an actual return of cash to a customer, by a licensee's salesman, out of the commission paid by the licensee to his salesman, did
4481 you not? A. Yes.

Q. Well, there were other ways, weren't there, to accomplish commission splitting? A. Well, I think I had some complaint here where—no, that wouldn't be a commission split—of a direct cut in price, and also where a refund was made by salesmen other than commission men.

Q. But I refer to this situation: Wasn't it a common practice of some of these licensees to sell to a dealer, and then name one of the officers or employees of that dealer, or a relative of the dealer, as a commission salesman for the manufacturer, and pay him a commission, which he in turn gave to the dealer company? A. It seems to me there is a case of that kind. It doesn't come to mind just at this moment.

Q. But that was a practice which was frequently used, according to your information, in your area, wasn't it? A. Well, this Dusol matter is an outstanding example of that.

Q. Well, is that because there was some connection between the salesman Dusol, and the customer Dusol? A. They were brothers.

Q. They were brothers? A. Yes.
4482 Q. Well, is that an example of what I just said? Didn't the salesman Dusol give to the customer Dusol a part of the commission? A. Yes.

Q. Well, I am not talking about that situation at all, and I am trying to find out from you whether there wasn't another analogous situation in which a licensee-manufacturer would sell a dealer, and say to the dealer, "Now, if you will buy from me, I will make you or one of your employees, for the purpose of this transaction, a commission salesman of mine, and pay you a commission."? A. I don't recall, at the moment. I think there was something of that kind, but it has slipped my mind for the moment. Can you give me something to refresh my memory with?

Q. Weren't you active in the formulation of the NRA Code of Fair Practices? A. Yes.

Mr. Steffen: I think that comes up somewhat later, Your Honor. This is 1932 that we are inquiring about.

Mr. Bromley: I am trying to refresh his recollection.

Mr. Steffen: As to subsequent events?
Mr. Bromley: Yes.

By Mr. Bromley:

Q. You were a member of the Code Authority,
4483 weren't you? A. Yes.

Q. Don't you remember that in formulating that Code, you considered this problem? A. I think we did. I haven't seen the Code since 1935, and I don't remember.

Q. I refer you to Rule 10 of the Code of Fair Competition for the Gypsum Industry, which provides:

"No member of the industry shall permit splitting of commissions or other compensation"—

Mr. Steffen: (Interposing) I don't think that should be read into the record, Your Honor.

Justice Stephens: You may show it to the witness, Mr. Bromley.

Justice Jackson: Mark the portion you want him to read.

Mr. Bromley: It is Rule 10. It is marked in pencil.

(Document referred to handed to the witness.)

By Mr. Bromley:

Q. Mr. Lenci, having read that rule, does it bring back to your mind at all that this very man, George Dusol, mentioned in the fourth paragraph of your letter, Exhibit 449, was really connected with dealer Dusol, and as a matter of actual fact wasn't a commission salesman
4484 for Kelley at all? A. Well, we had a pretty good idea that that was the case.

Justice Stephens: Hand that to the Court, please, Mr. Marshal.

(The Code referred to was handed to the Court.)

Justice Stephens: Hand it to counsel for the Government, if they wish to see it.

(The Code was handed to Government counsel.)

Justice Stephens: Proceed, Mr. Bromley.

Mr. Bromley: I will withdraw the last question.

By Mr. Bromley:

Q. Isn't it your recollection now, Mr. Lenci, that the George Dusol referred to in the fourth paragraph of Exhibit 449, was really connected with dealer Dusol and was not an employee of the Kelley Company at all? A. I

certainly believe that he was connected with the Dusol Lumber Company.

Q. Isn't that an example of what I have been asking you, to-wit, an example of where a licensee-manufacturer—

Mr. Steffen: (Interposing) Your Honor, I would like to object to the last answer, which was answered in the form of "I believe", and I don't believe that that can be introduced as proof, if that is what Mr. Bromley wishes to do, that George Dusol was hired by Dusol & Son.

Justice Stephens: Your objection is well taken.
4485 What the witness believes is not to be retained in the record.

State what your recollection is, if it is refreshed, unless you mean by the word "believe" that that does reflect your recollection.

The Witness: Well, it was always our understanding that he had a financial connection with the Dusol Company.

Justice Stephens: Very well.

By Mr. Bromley:

Q. Was it also always your understanding that he had no employment by the Kelley Company as a salesman at all? A. No, I think he had some employment by the Kelley Company, too, on commission.

Q. Well, did he work for the Dusol Company or did he work for the Kelley Company, or for both? A. I would say for both.

Q. For both? A. Yes, because I know he was soliciting orders from other customers besides Dusol.

Q. Well, then, it was your understanding, at the time you made the complaint in the fourth paragraph of Exhibit 449, that he was paid a commission by Kelley, and gave some of it to Dusol, the dealer, for whom he also worked; is that right? A. That is correct, yes.

Q. And you were complaining because you thought
4486 that was a rebate by Kelley? A. That is right.

Q. Now the situation would have been just as objectionable, in fact perhaps more so, if Dusol had been employed solely by Dusol, dealer, and not at all by Kelley, wouldn't it? A. Yes.

Q. Well, is it your recollection now that that sometimes happened, that is, that licensees would pay commissions, ostensibly salesmen's commissions, to men connected with the customer and not connected with the manufacturer at all? A. I have at the moment no definite recollection of certain individuals.

Q. Wasn't it your understanding that the license bulletins of USG did not outlaw commission men, as such, but merely were aimed at prohibiting the practice of splitting commissions with customers to effect a reduction in the price? A. Yes.

Q. Will you look at the February 6, 1939, bulletin, No. 5, which appears, for the Court's convenience, at pages 95 and 96 of the complaint, beginning at the bottom of page 95.

(The bulletin referred to was handed to the witness.)

4487 By Mr. Bromley:

Q. Now, do you see that provision under "Rebates, Allowances, Etc."? A. Yes.

Q. And do you see that that provides that:

"Any sale of patented products, though ostensibly made at or above the minimum price established by licensor, will nevertheless be considered a violation of the provisions of the license if licensee directly or indirectly reduces the actual price charged by licensee below such minimum price by"—and then down four more lines—"splitting of salesmen's compensation or commissions with customers"? A. Yes.

Q. Now, wasn't it your understanding that that is all that was ever prohibited, at any time, by the licensor, so far as the activities of commission salesmen were concerned? A. Yes.

Q. You had commission salesmen in your company right through this entire period, didn't you? A. Well, I wouldn't say that we did, because we never liked commission salesmen.

Q. Well, as a matter of fact, from 1929 up until the present time, haven't you more or less without interruption had one or more salesmen compensated either partly or wholly by commission, on your payroll, whose time
4488 was devoted to the selling of patented gypsum board? A. Not continuously, no.

Q. Well, most of the time? A. A part of the time, yes.

Q. Now in Exhibit 450, the Board Survey Company acknowledged your complaints, and said that the matters were being investigated; is that right? A. Yes.

Q. Exhibit 452 is dated prior to Exhibit 450, do you notice? A. Yes.

Q. Now in Exhibit 452, you were explaining to the United States Gypsum Company, the licensor, that you did not

have any jobbing arrangement with the Abbey Company, which meant a cut price; weren't you? A. Yes.

4489 Q. And in the fourth paragraph of Exhibit 452, in which you say that you "had no warehouse or trucking arrangement with Abbey and have no jobbing, warehousing or trucking arrangement with anyone else at the present time", you merely meant to deny some accusation that had been made against you that you were guilty of an indirect price cut to Abbey by means of some warehousing or trucking or jobbing arrangement, did you not? A. Yes.

Q. You understood, didn't you, Mr. Lenci, that there was no prohibition on the part of USG against your having a warehouse wherever you wanted one? A. That is right.

Q. But that the only prohibition was that you should not use a warehouse arrangement as a secret or indirect way to lower the price of the board which you were selling to the dealer from whom you leased warehouse space? A. That is correct.

Q. But you understood that if you had a bona fide lease of warehouse space, and you paid full value for it and you used it, that you could have that arrangement with anybody, including a dealer, didn't you? A. Yes. It happens that we didn't do that, but I understood it that way.

Q. In Exhibit 452 not only did you deny the accusation which had been made against you with reference to

4490 your sales to the Abbey Company, but you again called the attention of the licensor to the fact that you thought that some of your competitors had been guilty of this type of indirect price cutting, didn't you? A. Yes.

Q. Did you feel at that time that these warehousing, jobbing and trucking arrangements of which you felt your competitors were guilty, had a seriously adverse effect upon your own business? A. Yes.

Q. Will you look at Exhibit 453, please? In the first paragraph you refer to sales of board on a consignment basis, do you not? A. Yes.

Q. Would you say that the practice of shipping board to a dealer on consignment, at the price fixed in the bulletin say for a carload sale, was a device to effect a price cut? A. Yes.

Q. Will you please explain that? A. Well, using your example, if a dealer were shipped a carload of material and he could keep that in stock and not pay for it until he sold it, which might run over a period of months, that certainly was taking an unfair advantage of anyone else who would

sell him and expect to be paid on the usual credit terms—

4491 Q. (Interposing) Well, if you shipped a dealer a carload of board on consignment— A. (Interposing) I hadn't quite finished my answer.

Q. Excuse me. A. Furthermore, in shipments on consignment, when that car is finally sold, the dealer will go to the manufacturer and say, "Well, there were 30,000 feet in that carload, but we only managed to sell 28,000, the car must have been short or the board was not up to quality, and we can't pay for the balance of the material"—which was a direct price concession, if allowed.

Justice Stephens: By shipping "on consignment" do you mean retaining title in the manufacturer until the price is paid?

The Witness: Yes. This was a practice that we did not follow ourselves, but I know how it worked. The manufacturer kept title, but put his goods in the hands of the customer and whatever the customer stated at the end of the period, the manufacturer had to accept in the way of payment.

By Mr. Bromley:

Q. Now of course the consignment relieved the customer of expense such as investment expense, didn't it? A. Yes.

Q. He had the use of his money and didn't have to pay for the board promptly, like other customers did?

4492 A. That is right.

Q. Wouldn't you say that if board were delivered by a licensee, a carload of board, on a consignment basis, to a dealer, that that was just as much a rebate to that dealer as it would be if the manufacturer had actually paid to the dealer in cash some sum such as $1 or $2 per thousand square feet of board? A. Yes.

Q. And do you remember that at this time Rule 17 of the Fair Practice Rules of the Federal Trade Commission had some relation to this consignment business? A. I believe there was something in the Fair Trade Practice Rules.

Q. Will you look at Defendants' Exhibit 3 for identification, page 5, Rule 17? Is that the rule which condemns the consignment business in the gypsum industry under the Fair Trade Practice Rules, Mr. Lenci? A. I don't think that that related to consignment.

Q. You don't? A. I think that that had to do with shipping cars without any order whatever from a customer; simply sending a car to a customer and expecting him to take it without an order.

Q. Well, if that had been done—

Mr. Steffen: (Interposing) Your Honor, I object to this. This document is handed to Mr. Lenci for the
4493 purpose of refreshing his recollection, and we are not here to construe the rules.

Justice Stephens: Well, I didn't understand, Mr. Bromley, that you were using this to refresh recollection. Are you or are you not?

Mr. Bromley: No, I am not.

Justice Stephens: If he is not, it seems to me—I will be glad to hear you, Mr. Steffen—that it is probably not improper cross-examination because it goes to the witness' understanding, and the alleged reasonable basis of these consignment rules.

Mr. Steffen: Well, the item that he has there, Defendants' Exhibit No. 3, is not in evidence, and I don't think it can be admitted in evidence, and we don't want any testimony concerning what that rule means, or concerning that rule even.

The witness can testify concerning his understanding of these matters that were being investigated upon in the light of it, but I don't think he can get that rule in indirectly.

Justice Stephens: We are not intending to get the rule in evidence, and I didn't understand that it was. I thought the examination was along just the lines that you stated, that he is being examined "in the light of" this rule, as shown him in this Defendants' Exhibit 3 for identification.

Mr. Steffen: For purposes of refreshing his recol-
4494 lection, yes.

Justice Stephens: I suppose for more than that, I suppose the cross-examination is directed to showing the witness' understanding of the consignment rule.

Mr. Steffen: That is not in issue, his notion of the consignment rule in the Federal Trade Commission's Rules.

Justice Stephens: I am talking about the consignment rule in the bulletins.

Mr. Bromley: I am trying to cross-examine him to show that a consignment was an unfair trade practice, and a rebate.

Mr. Steffen: I think that question has been answered.

Justice Stephens: Rule 17 of the Fair Trade Practice Rules of the Federal Trade Commission is not being received in evidence, and if it has been read into the record it may be excluded. But the cross-examination itself we think is not improper.

(Thereupon, there was a conference between the Judges.)

Justice Stephens: My Brother disagrees with me and I of course will abide by any ruling the majority makes. I didn't understand that this examination was upon Rule 17 of the Federal Trade Commission Rules, but that it was only a reference to that for the purpose of testing the man's reasonableness and recollection with respect to the purpose of the consignment rule.

4495 Mr. Bromley: That is all I was intending to do.

Justice Jackson: I thought you were going to question him on Rule 17, and I don't think that would be proper, if it has only been marked for identification.

Justice Stephens: Re-ask your question. That will present the matter more clearly to all of us. Judge Garrett would like to be better informed.

By Mr. Bromley:

Q. Well, as of this date, the practice of shipping board on consignment was condemned by the gypsum industry as an unfair trade practice, wasn't it? A. Yes.

Mr. Steffen: We object to that, your Honor, as being completely outside the direct examination and not proper, and for the reason, further, that the rule appears in the bulletins as respects commissions and I don't see—as far as I know that may be made up in part because of the rule that appears in the bulletin—in other words, I don't think that a reference to Rule 17 and a discussion as to what the gypsum industry's policies were, based apparently upon some notion of Rule 17, is material to this line of examination.

Justice Stephens: This last question didn't mention Rule 17.

Mr. Steffen: I thought the "gypsum industry" was a reference from the paper which Mr. Lenci had before him.

Justice Stephens: I didn't so understand the question.

4496 Justice Jackson: I didn't understand it that way.

Justice Stephens: The objection is overruled.

By Mr. Bromley:

Q. In your judgment, as of that time, that is as of May 31, 1932, the practice of shipping board on consignment constituted a rebate to the dealer who got that accommodation, did it not? A. Yes.

Q. And that is what you were complaining about in your Exhibit 453? A. That is correct.

Justice Stephens: We will suspend at this time for the afternoon.

Before we adjourn, let me say to Mr. Steffen or Mr. Knuff, whoever has charge of it for the Government, that we received this morning a motion with respect to the proposed deposition of Mr. Gloyd, with an affidavit and attachments. If you wish to file counter affidavits, please do so tomorrow, if you can, so that we can get a chance to consider them, and then have a brief discussion, if necessary, on Friday, so that we may make a ruling before we adjourn in order that you may know where you are going to be, both of you.

Mr. Steffen: We will file an affidavit tomorrow morning, your Honor.

Justice Stephens: Thank you.

4497 (Thereupon, at 4:10 o'clock p. m., an adjournment was taken until 10:00 o'clock a.m., Thursday, February 24, 1944.)

4498 IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA,

Plaintiff,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS,

Defendants.

Seventh Floor,
Internal Revenue Building,
Washington, D. C.,
Thursday, February 24, 1944.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

APPEARANCES:

(Same as heretofore noted.)

4502 Thereupon, GEORGE N. LENCI the witness on the stand at the time of adjournment, resumed his testimony as follows:

Cross Examination (resumed)

By Mr. Bromley:

Q. With reference to what the Presiding Justice said a minute ago, Mr. Lenci, will you look at your answer beginning at line 5 on page 4784, and clear up for us your use of the word "short", in view of the fact that you
4503 seem to have assumed that the dealer said to the manufacturer, "Well, there were 30,000 feet in that carload * * *"? A. I have already seen the answer, just a moment ago.

What I intended to say there was this: Suppose we shipped a car with 30,000 feet, on consignment. The dealer would claim, when that material was all sold, that while we said there was 30,000 feet, there was only 28,000 feet or less, and that there was consequently a shortage there which he was not responsible for.

Justice Jackson: And he wouldn't pay for it?

The Witness: That is right. And there might be breakage that he wouldn't have to pay for, and it would leave the whole thing in a good deal of a mess when you got through.

Justice Stephens: I see what you mean.

By Mr. Bromley:

Q. So if you allowed his claim when, as a matter of fact, his claim was a false one, you would be making him an allowance which would reduce the price; is that right? A. That is correct.

Q. Now will you look at page 4740. Will you read to yourself from line 13 to line 25, please? A. (After examining testimony). Yes, I have read that.

Q. I would like to re-ask my question beginning at
4504 line 18, Mr. Lenci, in this form:

The USG bulletins at some time or other fixed a price at which a licensee could sell gypsum board to a dealer and make the delivery by truck, did they not? A. Yes.

Q. And in so fixing that price, the bulletins would frequently define the area within which a licensee could deliver board to a dealer-customer at that price, would they not? A. Yes.

Q. And assume that the bulletins fixed a price of $15 for lath, if delivered by truck, within New York County, in metropolitan New York City. If your company made a truck delivery at the price of $15 to a dealer in Bronx County, you would be rendering a service to the Bronx dealer which might cost you more than $15, would you not? A. Yes.

Justice Jackson: Isn't Bronx considered part of the metropolitan district?

Mr. Bromley: It is, sir, but I was making a distinction between New York County and Bronx County.

Justice Jackson: You said the metropolitan district, I thought.

Q. Well, I will make it plainer. Let me ask you this:

4505 If the bulletin provided for a $15.00 price for deliveries within the five metropolitan boroughs of New York, and you made a delivery in Westchester County at $15.00 to a dealer, you would be rendering a service to that dealer which might cost you more than $15.00; isn't that right? A. That is correct, yes.

Q. In other words, if you made deliveries outside of the area specified in the bulletins, at the prices specified in the bulletins for deliveries within the area, you would be cutting the price which should apply to deliveries outside the area, wouldn't you? A. Yes.

Q. Now, we were talking, at the close yesterday afternoon, about rebates in the indirect form of sales of small quantities at a price fixed for a larger quantity, and sales on a consignment basis.

You recall, don't you, that in 1934, when the Code of Fair Competition for the Gypsum Industry was approved and adopted, that it was one of the requirements under that Code that all members of the gypsum industry file with the Code Authority their prices? A. Yes.

Q. And as you said yesterday—

Mr. Steffen: Your Honor, I object to this investigation of the Code Authority. It seems to me that that is
4506 certainly not within the direct-examination, and it is introducing a matter here which hasn't any bearing, as I see it, upon the examination as it has proceeded.

If Mr. Bromley, on his case-in-chief, wishes to introduce the NRA Code, it is his privilege to do so; but I don't think it should be brought in backhanded this way.

Mr. Bromley: Well, my purpose in doing this is because I conceive that the Government's direct-examination went into the field of inquiry of this witness as to whether or not things like consignment really affected price or didn't.

Now I would like to cross-examine this witness in an attempt to show things like the fact that consignment basis selling did affect price. And for that purpose I would like to develop that during some of the time these bulletins were in effect and provided for trucking areas and for minimum quantities, the NRA Code was in effect which, I hope to be able to show, recognized that a sale on a consignment basis was a way of cutting the price, and that other practices which appear in our bulletins, both before the Code, during the Code and after the Code, were, during the Code days, recognized by everybody as matters which directly affected price.

Justice Stephens: Do you wish to reply, Mr. Steffen?

Mr. Steffen: I do, Your Honor.

4507 It seems to me, from Mr. Bromley's present statement, that the error in his examination is apparent. He says that he wishes to develop from the NRA Code that matters of shipping on consignment, for example, affect price. That is definitely going into the NRA Code, which has not been introduced before the Court and we have no information before the Court as to whether the NRA was designed to affect price.

As a matter of fact, the NRA was designed to affect everything, and therefore his reference to the NRA Code would certainly not establish the point that he wishes to establish, and it would be introducing, as I have stated, some extraneous matter here which we have had no opportunity to present and which we would strenuously object to if it were offered directly.

It is irrelevant to a discussion as to what the gypsum industry was doing, and it is no excuse, whatever the NRA may have done is no excuse for anything that these defen-

dants may have done. As a matter of fact, many of the regulations which were approved under the NRA—which, as Judge Garrett pointed out yesterday, was subsequently held unconstitutional—would have been direct violations of the Sherman Act. Therefore, he can not refer to what would be a violation for purposes of attempting to justify an action here. This case comes up unembarrassed
4508 by the NRA Code, and we are, I think, to listen to this evidence strictly on its own merits.

Justice Stephens: Of course, the NRA wasn't declared unconstitutional on any grounds touching the Sherman Act, but on the ground that it was an unconstitutional delegation of legislative authority, and the NRA contained exemptions with respect to the Sherman Act.

Now the Court is not of the view—is not assuming to hear these references to the NRA as any proof of what the NRA required, but the Court, as presently advised, is of the view, Mr. Steffen, that this is not improper cross-examination, for this reason: The Government has gone into these various bulletins and all the provisions thereof, which are so clear to all of us now that we don't need to mention them specifically, for the purpose of showing that they are illegal restrictions upon commerce.

Now the defense has a right to try to prove by cross-examination, if it can, that they were not illegal restrictions upon commerce, but that they were methods recognized in the trade as safeguards against price cutting.

In our understanding of the proprieties of cross-examination, where the witness has been presented by the plaintiff to prove a given theory, references may be made, in the course of cross-examination, to items of ever so varied a character, not introducible in and of them-
4509 selves, as tending to prove a contrary theory, or to make reasonable the answers which the witness is being sought to give, on the cross-examination.

It seems to us not improper cross-examination, and is not an attempt to introduce into the record directly the NRA provisions. It is ordinarily a convention, in cross-examination, to try to call the attention of the witness, who has been called by the opposite party, to items which would tend to cause him to contradict or to modify his previous testimony, if that can be accomplished by the cross-examination.

Mr. Steffen: If that were the purpose, I think there might be little objection to it, but I think the attempt is

to attempt to excuse what was done by the defendants by showing that under the NRA they had some regulations concerning consignment, and in so far as that is concerned, I think the whole scope of the evidence is immaterial and irrelevant, and I think it is misleading in that we have had no evidence here concerning the NRA Code, or whether the NRA Code would be legal under the Sherman Act. And I state to you that in many respects it would not. Therefore, he is appealing to an illegal practice for purposes of justifying what we contend here is also an illegal practice.

The whole scope of the evidence would be to clutter
4510 up the record and get a lot of irrelevant and misleading testimony before Your Honors, and it does nothing toward determining whether the witness has been telling the truth or not. We have no doubt on that score but what he has been.

Justice Stephens: It seems to the Court that it is not an attempt to put the NRA Code in evidence as either legal or illegal, but it is an attempt to refer to a circumstance which may cause the witness to put a construction upon his direct-examination of an opposite or qualifying character.

Is that your purpose, Mr. Bromley?

Mr. Bromley: Yes, Your Honor.

Justice Stephens: The objection is overruled.

By Mr. Bromley:

Q. Under the NRA Code, all members of the gypsum industry—

Mr. Steffen: (Interposing) I object to reading this into the record. Do you want to show the witness the NRA Code?

Mr. Bromley: I am not reading it in.

Mr. Steffen: We object to having statements of the NRA Code in evidence, either by reading from them or quoting from them or summarizing them. If you want to test the witness concerning the NRA provisions, I should think they might be shown to him.

4511 Justice Jackson: This man was a member of the Code Authority of the Gypsum Industry, wasn't he?

Mr. Bromley: Yes, he has so testified.

Justice Jackson: I think you can ask him what he understood.

Justice Stephens: The record may show your objection. It seems to the Court that you would restrict the cross-

examination to a point where it would make it very difficult to conduct it. If the cross-examiner can not refer to items and describe items in sufficiently clear terms to bring them to the attention of the witness' mind, whether he reads them, summarizes them or shows them to the witness, I don't see how he can refer to items which may tend to change the direct-examination.

Of course, if this witness' recollection were being refreshed, we would certainly consistently enforce the ruling that anything which was offered to refresh his recollection should not get into the record. I don't understand that that is the purpose here.

The record may show a continuing objection, to protect the Government's objection in this matter, and that it is overruled.

By Mr. Bromley:

Q. Under the NRA Code, Mr. Lenci, each member of the industry was required to file with the Code Authority
4512 its complete price lists, was it not? A. Yes.

Q. And under that Code, each member was required to file with the Code Authority any change that it made in its prices? A. Yes.

Q. And under that Code, each member of the industry was forbidden to sell at prices other than those—

Mr. Steffen: (Interposing) Your Honor, I object to this. It is simply a direct reading into the record of the NRA Code. Why not put it in as an exhibit, or offer it? If he wants to ask the witness some questions as to what they did—that is all we asked—go ahead, but don't read the whole NRA Code into this record, for whatever purpose.

Mr. Bromley: This is all only preliminary.

Justice Stephens: The Court has carefully considered your objection, and understands that this is preliminary to asking the witness a question directed towards attempting to modify his testimony on direct-examination.

Mr. Steffen: May I move to strike the entire testimony, then, if it is for any other purpose than to attempt to modify?

Justice Stephens: I don't think you have a right to move to strike testimony which proves to be unsuccessful on cross-examination.

4513 Mr. Steffen: All right.

Justice Stephens: You may make such motions as you feel advised that you ought to make, of course, at any time, but the present objection is overruled.

By Mr. Bromley:

Q. And under the Code, no member of the industry was permitted to sell at a price or prices below those filed, isn't that right? A. That is correct.

Q. Now, isn't it a fact, sir, that under the operation of the Code, if a member sold a small quantity of his product at the price fixed for a carload quantity, it was considered to be a price violation? A. Yes.

Q. And isn't it a fact, sir, that under the Code, if a member made a sale on consignment to a customer, it was considered to be a violation of his filed prices?

Mr. Steffen: I must ask, Your Honor—Mr. Bromley is obviously not asking or expecting that this witness is going to change his testimony. He is trying to explain and confirm his testimony, and under Your Honor's ruling this course of examination is utterly improper.

Justice Stephens: Mr. Steffen, the Court doesn't wish to argue the point with you. It has made its ruling as clear as it can. It tries to state the basis of its rul-
4514 ings so that counsel will be advised that the Court has reasons for its rulings, and for the guidance of counsel. The Court was using the term "modify" in the conventional sense with respect to cross-examination. It seems to the Court that it would be error to deny to the opposite party the right to make reference to these matters for the purpose of asking the witness to make statements concerning the practices which the Government has examined upon, and which statements might be construed by the Court as modifications, qualifications, or reconstructions or different constructions of these practices than those put upon the witness' testimony and these practices by the Government.

The Government's contention under the direct-examination, as I understand it, is that the witness' testimony supports the inference that these bulletins, and all of the items under the bulletins which we have been discussing, are illegal restrictions upon trade, upon commerce.

Now the defendants have a right to try to prove, either by direct or cross-examination, that the actual effect of them was to protect price, not to regulate commerce. And the practice of the industry in respect of them is an item, it seems to me, which the defendants are entitled to call to the attention of the witness in order that they may contend that his testimony leads to a different construction of the practices than the Government insists upon.

4515 Mr. Steffen: I have no objection to their going

into the practices of the industry, but when they appeal to an extra-legal matter, such as the NRA Code, for justification for anything that was done in the industry before or after the Code, the matter is not relevant to this proceeding and it seems to me to be improper cross-examination—

Justice Stephens: (Interposing) You have made your position very clear upon that, Mr. Steffen, and I think your record is adequately protected. It may be that Government counsel has an entirely different view of what is proper cross-examination than the Court has, and we want you to feel free to urge your differences and to make your record.

If this case, at the close, should be decided against the Government, you may urge upon the Supreme Court, of course, that our conception of cross-examination is incorrect. We want you to be fully within your rights in doing that.

The objection is overruled.

By Mr. Bromley:

Q. And you recall that you testified the other day, on direct-examination, that under the bulletins you felt your company was prohibited from making gifts of free materials to your dealer-customers? A. Yes.

Q. Well, that same thing was expressly provided
4516 in the NRA Code as being a rebate to the dealer from the seller, wasn't it? A. Yes.

Q. And the Code prohibited a gypsum manufacturer from making a gift to a purchaser in connection with the sale of his goods, whether in the form of money or gifts or otherwise, didn't it? A. Yes.

Q. And the NRA Code also prohibited a member from indirectly reducing his price by furnishing other materials without charge to the customer? A. Yes.

Q. And the Code referred specifically, did it not, to this subject matter that you talked about the other day—advertising allowances? A. Yes.

Q. And provided that if a member of the gypsum industry should make a customer an allowance for advertising not actually placed, that that should be considered a rebate? A. Yes.

Q. And it also had a provision that allowing false or inflated damage claims should be considered a rebate, did it not? A. Yes.

4517 Justice Garrett: Mr. Bromley, I am not sure that

I have understood as clearly as I should. Are you bringing this matter out here from that Code for the purpose of arguing that that Code was justification for the activities of these defendants?

Mr. Bromley: No, I am certainly not bringing it out for the purpose of arguing that the price fixing by USG was lawful because prices were fixed under the NRA Code. I am not doing that.

I am, however, seeking to bring it out to show that not only in the industry as a matter of practice and custom, but in a more formalized way, with the approval of the Government, provisions were considered by everybody as having a direct relation to price, of precisely the same nature which this witness' direct-examination has shown were contained in our bulletins, and interpreted by him in the way in which he has testified.

In other words, to make a specific example, this witness was asked a lot of questions about whether he could rent warehouse space from a dealer, with the obvious purpose on the part of the Government to show that that didn't have any relation to price and that that was a restriction that was unreasonable, that went way beyond the holding in the General Electric case.

Now it does seem to me to be material and per-
4518 suasive if I can show to this Court, by cross-examination of this witness, that in the NRA days the NRA Code prohibited members of the industry from making warehouse arrangements with dealer-customers, for the reason that everybody knew that that was a dishonest sort of an arrangement which covered a hidden rebate. That is all I am seeking to develop this line of testimony for.

Justice Jackson: And you are seeking to do that in its proper relation to what were considered to be correct or incorrect practices prior to the NRA and subsequent to the death of the NRA?

Mr. Bromley: Yes, I am.

Mr. Steffen: I think I should be permitted to make a short statement in reply to Mr. Bromley.

Justice Stephens: You may.

Mr. Steffen: That is, I take it that he has stated the basis upon which he intends to argue upon this evidence at the closing, and he indicates that a warehousing arrangement, as he says, as everybody knew, was a dishonest arrangement, and that it constituted a rebate, and that therefore it should be abolished as an improper trade practice.

Now I think if it is permissible for Mr. Bromley to make use at all of these regulations, it is necessary to show that they were price regulations, and there is no show-
4519 ing at all that these matters of warehousing, these matters of commission men, and all of the other things that were brought up in the NRA, were necessarily related to price at all. They didn't hesitate to regulate anything that they thought was an improper practice, price or no price, and it seems to me, therefore, that the appeal to the NRA, as a justification,—for that is exactly what Mr. Bromley's argument boils down to,—is not a proper appeal by way of cross-examination, that it introduces matters which have no probative value to establish his ultimate purpose—that is, that what the USG did was justified. We still object.

By Mr. Bromley:

Q. Can you recall, Mr. Lenci, what provision, if any, was made in the NRA Code having to do with warehousing or warehousing arrangements? A. Well, I think it was along this line, that it would be considered a price concession, a price cut, for a manufacturer to make an arrangement with a dealer to pay him rental for space, which was, in effect, a rebate.

Justice Jackson: In the dealer's warehouse?

The Witness: Yes. In other words, if the dealer bought a car of material, was buying material right along, and the manufacturer paid him rent in excess of what the value of that space might be if the manufacturer ever made
4520 use of it himself, but purely for the purpose of giving him a concession, that was a cut in price, it was a cash consideration for placing the business with that manufacturer.

By Mr. Bromley:

Q. Well, in that connection, do you recall that the NRA Code provided that the rental of warehouse space owned or leased by manufacturers, to dealers, at a rental less than what the fair value would be for other similar property in adjacent territory, shall be considered to be a rebate? A. If the rental was less—

Justice Stephens: (Interposing) I am sorry, I missed that question. Will the Court Reporter read it?

(The question was read by the reporter.)

The Witness: That is the opposite form of it, that is rental of space by a manufacturer to a dealer at less than the value of the property.

By Mr. Bromley:

Q. That is the reverse? A. That is the reverse situation.

Q. I see.

Well, do you recall that there was a provision in this Code as to the situation which I have been asking you about, namely, the rental by a manufacturer of warehouse space from a dealer? A. I think there must have been,
4521 because that was always a matter before us.

Q. And do you remember that so far as the NRA Code was concerned, that provision took the form of an absolute prohibition, and said that no member of the industry shall hereafter rent or lease or extend any existing lease for warehouse space for industry products from lumber or building material dealers? A. I believe there was a clause to that effect in there.

Q. Wasn't the purpose of that prohibition in the NRA Code because of the fact that the abuse was recognized to be so widespread that it was thought by the Code Authority and the members that the only way to stop the rebate was to prohibit the renting of any space at all? A. Yes.

Q. As between seller and buyer in this field? A. Yes.

Q. You were asked some questions with respect to the provisions of the USG bulletins which provided that it should be considered to be a rebate if you sold a mixed car, to a dealer, of board and plaster, and fixed your plaster price at a figure below your current price, or something to that effect.

Do you recall those questions and your answers? A. Yes, I do.

4522 Q. During all of this period, it is a fact, so far as your company was concerned, that you knew from day to day what your current market price for plaster was; isn't that right? A. Yes.

Q. I mean, you had every day—which changed from time to time—a published price for plaster, at which you would sell plaster? A. Yes.

Q. And do you recall that among the provisions of the NRA Code was one which provided that no industry member should offer for sale other commodities at prices below the member's current prices for such other commodities,

for the purpose of influencing the sale of industry products? A. Yes.

Q. Now that is the same kind of a thing, is it not, as the provision in the USG bulletins to which you were testifying the other day? A. Yes.

Q. That practice of selling gypsum products of different kinds to one purchaser is known in the industry as a combination sale, isn't it? A. Yes.

Q. And it is also known as mixed car business? A. That is the commoner name for it.

4523 Q. But the type of order which is filled by a mixed car shipment is a combination order of board and plaster and other gypsum products, isn't it? A. That is right.

Q. And, of course, under the NRA Code it was specifically provided that there should be no splitting of commissions as between the seller's commission salesmen and the buyer of the products, isn't that right? A. Yes.

Q. Now, all of the things which I have mentioned to you in my questions this morning were, under the NRA Code, considered to be rebates or price cuts, weren't they?

Mr. Steffen: I should like to object to that. That asks for a construction of the NRA Code, and it is an attempt to make the witness testify that these matters were regularly construed, under the NRA Code, as constituting a price cutting or rebate, and it seems to me that he is not qualified to make that deduction. The NRA Code is not in evidence.

Justice Stephens: Read the question.

(The question was read by the reporter.)

Justice Stephens: Considered by whom, Mr. Bromley?

Mr. Bromley: By the Code Authority.

Justice Jackson: Of which you were a member?

The Witness: Yes.

4524 Justice Stephens: Are you objecting to this, Mr. Steffen, on the ground it is not proper cross-examination, or on the ground that this witness is not qualified to say what these practices were considered to be by the NRA Code Authority?

Mr. Steffen: I thought I had a continuing objection on the matter of whether it was proper cross-examination.

Justice Stephens: You have.

Mr. Steffen: My specific objection, and the only reason I spoke at this moment, was that as I construe the question, it calls for a construction of the NRA Code. The

NRA Code is not in evidence, and I don't think it ever will be; and I don't see how the witness could be qualified in any event to construe the Code or what was in the Code Authority's mind.

Justice Stephens: Since he was a member of the Code Authority, we think that objection is not well taken. Overruled. Judge Garrett dissents from that point of view.

Mr. Bromley: Do you remember the question, Mr. Lenci?

The Witness: You had better read it.

(The question was read by the reporter.)

The Witness: Yes.

By Mr. Bromley:

Q. Wasn't it generally considered, Mr. Lenci, in
4525 the industry, before, during, and after the NRA period, that these practices about which I have been inquiring of you this morning were methods of cutting prices by a manufacturing seller? A. Yes, looking at it from a business standpoint.

Mr. Steffen: I object, because the question calls fc conclusion as to what the industry considered. I should think that that is entirely too broad.

Justice Stephens: If he knows that—and it would seem clear that he must, because of his experience in the industry—it would seem not to be the type of conclusion which is objectionable. My theory, and I thought it was shared by Judge Garrett and I know it is shared by Judge Jackson, of the propriety of this examination, Mr. Steffen, I apparently still haven't made clear.

You have conducted the direct examination of this witness to try to show that the purpose of these bulletins, and the regulations under them, was restraint of trade. It seems to Judge Jackson and myself—

Justice Garrett: (Interposing) On this question I am not in disagreement—

Justice Stephens: (Interposing) Very well.

(Continuing)—and also, then, to Judge Garrett, that the defendants have a right to try and show that the purpose
of these regulations was not restraint of trade but
4526 was the prevention of unethical and improper and unfair practices.

Now, it would be proper cross-examination, it seems to us, to refer to items, whether in the NRA Code or in any other code, formal or informal, industry understandings, and the like, which might influence the purposes of the in-

dustry, which might tend to clarify or show what the purposes of the industry were. It should be as open to one side as the other.

Now surely the Court can be trusted, as Judges sitting here without a jury, not to be bound by the provisions of the NRA Code, and to look upon them only as items referred to in cross-examination to help bring out what was the real purpose of the gypsum industry in making these regulations.

The recess this morning will have to be for 10 minutes, rather than five minutes. It may be announced at this time.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

4527 Justice Stephens: Proceed, gentlemen.

By Mr. Bromley:

Q. At page 4687 of the transcript I asked you some questions, Mr. Lenci, as to whether you had any understandings, outside of the license agreement, and then at line 5 on page 4688, I said, "Well, inside the license agreement".

Now in connection with those questions, I would like to ask you now—did you understand that there was anything in your license contract, or in the bulletins, which provided that USG should raise or stabilize the prices of gypsum board? A. No.

Q. And did you understand that there was anything in your license contract or in the bulletins issued thereunder, which provided that USG should fix or control the prices of plaster, or the prices of other unpatented products, such as Keene's cement, block and tile? A. No.

Q. And did you understand that there was anything in the license contract or the bulletins which provided that USG should or would eliminate jobbers from the distributive system? A. No.

Q. At page 4709 of the transcript, beginning at line 3, I asked you a question about Mr. MacLeish and Judge Rippey, which I have now concluded did not express
4528 my intention. What I meant to ask you was this.

Do you recall that prior to the time you executed the bubble board license, you had been informed by Judge Rippey that Mr. MacLeish had said that the Ebsary Gypsum Company should decide first whether or not they were interested in the savings and the other benefits to be derived from the bubble invention, before they should proceed to the question of taking up with USG the form of

the proposed license contract? A. That is, that Judge Rippey said that?

Q. Yes. A. Yes.

Q. And before you proceeded to negotiate the October, 1929, license, your company had decided that it did want to avail itself of, and use, the so-called bubble or foam board invention? A. That is correct.

Q. Now will you look at Exhibit 453, please?

(Government's Exhibit No. 453 was handed to the witness.)

By Mr. Bromley:

Q. Exhibit 453 is a complaint by you against what you considered to be an improper action by USG itself, isn't that so? A. Yes.

4529 Q. Now if it were true that USG, or a licensee, was making consignment sales to dealers in your territory, would that affect your ability to sell to those dealers to whom the consignment privilege was accorded? A. Yes, it would.

Q. And how would it affect your business? A. Well, if we sold these particular people we would expect to be paid on the usual terms; whereas, if some other company went in there and put the material in their warehouses, and said, "You don't have to pay for it until you sell it," that is a distinct concession—to our advantage.

Q. And might cause you to lose that customer, or a sale or sales to that customer? A. Yes.

Q. Will you look at Exhibit 454, please?

(Thereupon, Government's Exhibit No. 454 was handed to the witness.)

By Mr. Bromley:

Q. In that exhibit your treasurer was reporting to you, was he not, that the Ebsary Company had lost a sale to a prospective customer because some licensee had not lived up to the minimum price requirements applying to a certain quantity sale of board? A. Yes, to that territory.

Q. Now the customer was Louis Brooks, of Wash-
4530 ington, New Jersey? A. Yes.

Q. And Tomkins Brothers, the concern which made the sale, was acting as an agent for the Atlantic Company, according to your understanding? A. Yes, Tomkins Brothers, Tomkins Rockwall Company, and the Atlantic, were all very closely associated.

Q. And if Tomkins Brothers was making a sale at a price and delivering by truck to Washington, New Jersey, that meant to you, did it not, that the Atlantic Company was not living up to the bulletin requirements? A. Yes.

Q. And that is what you were complaining about in this exhibit, isn't it? A. Yes, we were complaining that Washington, New Jersey, was not in the trucking area at all, and by Atlantic permitting the delivery of a truckload to this outside area, that was a price concession to this customer—to our disadvantage.

Q. Do you know what the price was which Brooks was charged for the truckload delivery? A. I don't remember the amount in dollars, but he was charged the price which was in effect in the nearest county to him, to which truckload deliveries were permitted.

Q. Now what was it, according to your contention,
4531 that Brooks should have been charged? A. Well, my contention was that he should have been sold only in carload lots because that was specified by the bulletins, and the fact that they sold a truckload in there was a concession, they gave Brooks a truckload shipment at less than it would have cost him to buy it from us in carloads, and deliver it and truck it, unload it.

Q. This situation is the same kind of a situation as was covered in your answers to my questions with respect to Metropolitan New York truck deliveries, and deliveries in Westchester County, is that right?

Mr. Steffen: If you understand that. I think the reference is a little vague.

Mr. Bromley: I will withdraw the question.

By Mr. Bromley:

Q. Do you remember earlier this morning I asked you to assume an illustration in which truck deliveries had a price fixed for Metropolitan New York, but not for Westchester, and the licensee made a truck delivery in Westchester at the New York price? A. Yes.

Q. Well, the thing that Mr. Hough was calling to your attention in Exhibit 454 was that kind of a situation? A. Yes.

Q. Now again, this complaint was one in which you felt
that you had lost some business because of the At-
4532 lantic Gypsum Company's violation of its agreement with USG, did you not? A. Yes.

Q. Will you look at Exhibit 457, please?

(Thereupon, Government's Exhibit No. 457 was handed to the witness.)

By Mr. Bromley:

Q. That is a reply by the Executive Secretary of Board Survey Company to your complaint against Atlantic, is it not? A. Yes.

Q. By the way, your formal complaint to Board Survey Company is contained in Exhibit 455, is it not?

(Thereupon, Government's Exhibit No. 455 was handed to the witness.)

The Witness: Yes.

By Mr. Bromley:

Q. Now referring again to the second paragraph of Exhibit 457, doesn't that paragraph spell out the correct price which Atlantic, through its agent Tomkins, should have charged Brooks? A. That is correct.

Q. And that correct price is $36.28, according to Exhibit 457, isn't it? A. That is right.

Q. And that price is figured on the basis of the delivery of a less-than-carload lot, at the less-than-carload
4533 price fixed in the bulletins? A. Yes.

Q. And if Atlantic had charged the correct price under its license and the bulletins, to Brooks, Atlantic should have charged the less-than-carload price for this truck delivery? A. That is right.

Q. Now the less-than-carload price fixed by the bulletins for a sale of a less-than-carload quantity outside of the trucking area, was mill base plus the less-than-carload freight to destination, wasn't it? A. Yes.

Q. And in Exhibit 457 the Board Survey Company says, in effect, that Atlantic was guilty of a violation because it charged a price less than $36.28 for the delivery? A. That is right.

Q. By the way, is it the fact that under the published freight tariffs, as approved by the Interstate Commerce Commission, generally less-than-carload freight rates per unit of 1000 feet are very much higher than carload rates, freight rates? A. Yes.

Q. There is a very substantial difference per unit of a thousand feet, is there not, between the carload freight rate and the less-than-carload rate? A. Yes, there is.

4534 Q. So that as I understand you, Mr. Lenci, you were not complaining against Tompkins Rockwall, but

your complaint was against the Atlantic Company, a licensee, is that correct? A. Yes.

Q. And is it true that the usual way in which you learned about an alleged violation by a licensee was information as to what some third party was doing, generally a customer of a licensee? A. Yes.

Q. For instance, if you found that one of your dealer-customers was buying board from the Certain-teed Company, and in the sales to the consumer or the contractor by the dealer, he was getting a price at or about his cost from Certain-teed, you would be suspicious of that transaction, wouldn't you? A. Very.

Justice Stephens: Read that question, please.

(Thereupon, the reporter read the pending question as follows:

"Q. For instance, if you found that one of your dealer-customers"—)

Justice Stephens: (Interposing) That is far enough. I am not quite sure what you mean, do you mean "dealer-customers" or "dealer's customers"?

Mr. Bromley: "Dealer customers".

Justice Stephens: Very well, I didn't understand
4535 clearly what you meant, and therefore the question wasn't entirely clear to me.

By Mr. Bromley:

Q. Now under the bulletin provisions, if Certain-teed sold to a dealer, Certain-teed was obliged to charge that dealer the price fixed in the bulletins which was generally called the dealer price, isn't that right? A. Yes.

Q. And at one time, for lath, the dealer price would be $13 mill base, plus the freight to destination, wouldn't it? A. Yes.

Q. Now suppose you found that a dealer was selling that board to a contractor at or about that price, that is, at or about the mill price to the dealer, plus the freight to destination—you would conclude that the dealer wasn't doing that as a matter of good business if he was paying the proper price to his supplier? A. That is right.

Q. Because you would expect a dealer, generally speaking, to resell the board that he bought at a figure higher than his cost, wouldn't you? A. Yes.

Q. Now if you found that a dealer was selling contractors or consumers at about the figure which should have rep-

resented his cost from the Certain-teed Company,
4536 what would you conclude with respect to Certain-teed,
if anything? A. I would conclude that Certain-teed had cut the price to that dealer.

Q. And you would conclude, wouldn't you, that the dealer was making his profit out of the cut which Certain-teed was giving him, below the bulletin price? A. That is right.

Q. And that would lead you, would it not, to complain not against the dealer, but against Certain-teed? A. Yes.

Q. But the basis of your complaint would be the evidence reported to you generally by your salesmen as to the price at which the dealer was selling the contractor? A. That is right.

Q. And it is true, isn't it, that you frequently were advised of what dealers were doing in the way of selling at low prices, not only by your salesmen, but by other dealer-customers who were in competition with the first dealer? A. That is right.

Q. If you were selling to two dealers in Astoria, Long Island, whose yards were adjacent to one another, and one of those dealers was undercutting the other, the man who was being undersold would complain to you that the supplier of his competitor must have been cutting the
4537 price to the other dealer, isn't that right? A. Yes.

Q. And the dealer who complained to you would complain because he would want you to meet the cut price? A. Yes.

Q. And that is the way you generally found out that some one or more of your competing licensees were probably violating the price bulletins, is that right? A. That is right.

Q. And isn't it a fact, Mr. Lenci, that over the years most of your complaints against licensees came up in that way, that is, through some reports to you by a salesman or a customer of what some customer of your competing licensee was doing, price-wise? A. Yes, they practically all would come that way.

Q. In other words, would it be fair to say that the evidence on which you generally based a complaint against a licensee was circumstantial? A. Yes, naturally.

Q. Because it was, generally speaking, impossible for you to know with any certainty exactly what the price was which a licensee had charged any particular customer of that licensee? A. That is right.

Q. In other words, these violations, and these price cuts by licensees, were generally concealed transactions,
4538 were they not? A. Yes.

Q. So that, generally speaking, the basis of your complaint against a licensee for violation of a bulletin, resided not in what the licensee was doing, but more generally in what his customer was doing? A. That is right.

Mr. Bromley: May the witness be shown Exhibits 431, 438, 449, and 454 and 455?

(Thereupon, the exhibits referred to were handed to the witness.)

By Mr. Bromley:

Q. Look at the third paragraph of Exhibit 431, beginning "Astoria Lumber Company".

Isn't it a fact, Mr. Lenci, that from the attitude of the Astoria Lumber Company you concluded that the Kelley Plasterboard Company must have been cutting the price so far as that proposed business was concerned, in its sale to Astoria? A. Yes.

Q. You had no information at all as to what the Kelley Company actually was doing, did you? A. No, except that we didn't get the order, and we had fully expected to get it, it had been promised to us.

Q. But you inferred from the circumstance that
4539 you did not get the order from Astoria, that Kelley must be guilty of a license bulletin violation in its price to Astoria, didn't you? A. That is right.

Q Will you look at Exhibit 438, the second paragraph thereof? A. Yes, sir.

Q. Now all you knew about that transaction was that a dealer named Duskis, was buying board from Orin F. Perry, which must have been sold to Perry by Certain-teed? A. Yes.

Q. That was the only information you had? A. Yes.

Q. From that you concluded, did you not, that Certain-teed must have been cutting the price to Perry below the dealer price? A. Yes.

Q. And in this instance you concluded that Certain-teed must have been selling Perry at a jobber's discount? A. Yes.

Q. In face of the fact that as of this time the correct price which Certain-teed should have charged Perry, even though he were a jobber, was the dealer price? A. That is right.

Q. So you concluded that Duskis could not have
4540 been buying from Perry—

Mr. Steffen: (Interposing) Your Honor, I make the objection that I think, as respects this exhibit, it is repetitious and I think that was all gone over yesterday.

Mr. Bromley: Not in this sense, I don't think.

Justice Garrett: In what way does it differ? It seems to me you went over all this yesterday, but you say now that you are going over it in a different sense.

Mr. Bromley: I was seeking to use it as an example of how the evidence of violations by licensees was circumstantial, in the sense that it needed a consideration on the part of the complainer of what the licensee's customer was doing, rather than what the licensee was doing. Perhaps I have sufficiently developed that.

Justice Jackson: You are abandoning that question, are you?

Mr. Bromley: I thought it was answered.

Justice Stephens: The answer may stand.

Mr. Bromley: However, I had not finished the question that I was asking, when Mr. Steffen raised the objection. Will you read my question as far as I had gone, Mr. Reporter?

(Thereupon, the pending question was read by the reporter as follows:

"Q. So you concluded that Duskis could not have been buying from Perry—")

4541 Mr. Bromley: (Continuing)—unless Certain-teed had been cutting its bulletin price to Perry?

The Witness: That is right. I might say, to clear that up, that we had sold a very large quantity of material to Daniel Duskis in years prior to this time, and on an equal basis we would unquestionably have received the business.

By Mr. Bromley:

Q. You mean by that, that if the price had been the same he would have given you his trade? A. I fully believe so, yes.

Mr. Bromley: May the witness see Exhibit 486, please?

(Thereupon, Government's Exhibit No. 486 was handed to the witness.)

By Mr. Bromley:

Q. Isn't Exhibit No. 486 another example of an instance where your information on which you based your complaint to the Board Survey Company, initially came from a dealer? A. Yes.

Q. And is it correct that the phrase, "one of our dealers" in Boston means that this was a Boston dealer who had been, up to this time, or was at this time, a customer of yours? A. Yes.

Q. And he informed you, did he not, that he had been offered a carload of lath at the dealer price by Wy-
4542 man & Allen? A. Yes.

Q. And of course you knew that Wyman & Allen had been jobbers of American Gypsum's board? A. That is right.

Q. Now what did you conclude from the information given you by this dealer-customer, as set forth in Exhibit 486? A. I concluded that the American Gypsum Company was continuing to sell Wyman & Allen Lumber Company at the dealer price, less a discount.

Q. And as of the date of this letter, Exhibit 486, the price which American should have charged Wyman & Allen was the dealer price without any discount, wasn't it? A. That is correct.

Q. So your complaint then was against American for a price violation? A. Yes.

Q. And the basis of your complaint was what Wyman & Allen were doing with respect to this Boston dealer who reported the instance to you? A. Yes.

Q. And it is a fact, isn't it, Mr. Lenci, that Exhibit 486 is a complaint against American for violation of its license, and the bulletins issued thereunder, and not a complaint against Wyman & Allen? A. Oh, no, it is a complaint
4543 against the American Gypsum Company.

Q. You knew that Wyman & Allen were not licensees, and that their price was not controlled by USG, didn't you? A. Certainly.

Q. Now didn't the same situation apply so far as these half-dozen or so manufacturing distributors are concerned? A. Yes.

Mr. Bromley: May the witness be shown Exhibits 440 to 446?

(Thereupon, Government's Exhibits Nos. 440 to 446 were handed to the witness.)

By Mr. Bromley:

Q. During the period of time covered by these exhibits, which was in the summer of 1932, isn't it the fact that you found that Structural was selling customers which you might otherwise have sold, in a way which left you non-competitive with Structural? A. Yes.

Q. And in Exhibit 440, you refer, do you not, to the fact that Structural was selling by truck in small quantities, and I refer you to the second paragraph of that letter? A. Yes.

Q. Now you knew, didn't you, that that kind of a delivery service in small quantities was a service to Structural's customers which cost Structrual money, and gave
4544 the dealer receiving that service a distinct advantage over his competitors? A. Yes.

Q. You were prohibited under the USG bulletins from giving that kind of service to those dealers, weren't you? A. Yes.

Q. You couldn't sell small quantities in truckloads at the price at which Structural was making the sale? A. That is right.

Q. And that caused you to lose prospective sales? A. Yes.

Q. And you were being very materially hurt by that kind of competition from the Structural Gypsum Company which was a manufacturing distributor, weren't you? A. Yes.

Q. Did you know, Mr. Lenci, that if Kelley were abiding by the bulletin restrictions on Kelley, so far as its sales to Structural were concerned, that Structural was receiving or should have been receiving only a small discount? A. Yes.

Q. Isn't it the fact, referring specifically to Exhibit 440, that you concluded from what you knew about Structural's practice, that Kelley must have had some deal with Structural which resulted in Kelley cutting its price, otherwise Structural could not consistently and regularly ren-
4545 der this special type of service to its customers? A. Yes, that was our feeling about it.

Q. And what was your attitude during these years with respect to the Kelley-Structural relationship generally, if you can tell us? A. We had a feeling right along that Kelley was giving Structural a very much larger distributor's discount than was permitted by the bulletins.

Mr. Steffen: I object to that, your Honor, as simply the witness' feeling. I don't know on what basis that could be admissible.

Justice Stephens: Technically the use of the word "feeling" is incorrect. I assume you are trying to find out the witness' understanding of these relationships, and the attitude of Kelley?

Mr. Bromley: Yes, sir, and the basis of his complaints.

Justice Stephens: The objection is sustained to the use of the word "feeling", but you may rephrase your question.

By Mr. Bromley:

Q. What was your understanding with respect to the Kelley-Structural relationship? A. We knew very well, from the result, that such an excessive discount must be given by Kelley to Structural to enable them to put out the prices and indulge in the practices which they did—

4546 Q. (Interposing) When you say "them" and "they"— A. (Continuing) That came right back to customers that we were selling, so I should not have used the word "feeling". It was a very definite loss to us.

Q. When you used the words "them" and "they", you meant Structural, didn't you? A. Yes.

Q. And in so far as this situation is concerned, you wanted somebody to do something about it which would stop the practice so far as the Kelley Company was concerned, didn't you? A. Yes.

Q. You knew that Kelley's sales to Structural were made by virtue of a written consent or permission running from USG to Kelley, didn't you? A. I assumed they had that consent, I never saw.

Q. You were familiar with the provisions of your license which provided that you couldn't sell a manufacturing distributor without USG's consent? A. That is correct.

Q. And you knew that Structural at that time was a manufacturing distributor? A. Yes.

Q. And it was your position that USG could withdraw that consent if it wanted to, was it? A. Yes.

4547 Q. And it was also your position that Kelley could stop selling Structural if it wanted to? A. Certainly.

Q. Did you have anything in your mind in making these complaints, of which Exhibit 440 is one, about the possibility that USG might be induced to change its bulletins so that you could become competitive with Structural? A. No, I don't think so.

Q. Wouldn't it have been possible for USG to have changed its bulletins at that time so that you could have made, to Structural's customers, the same kind of minimum quantity delivery by truck that Structural was doing? A. Well, if that was done we would not have been in favor of that, because that would be adding to the cost of our doing business.

Q. You wouldn't have wanted that change? A. No.

Q. By the way, speaking of trucking areas generally, was your attitude, and that of your company, in favor of extending trucking areas or restricting them? A. We were not in favor of trucking at all, for the reason, if you wish it—

Q. (Interposing) Yes, I would like to have it. A. Our plant is located in Upstate New York. The greater
4548 part of the business is around the Metropolitan areas of New York, Philadelphia and Boston, and unfortunately for our company, other manufacturers had plants in those three centers where they manufactured board, and they were able to take material directly from their plants, by truck, and make truckload deliveries throughout these areas. If we wanted to meet that condition we had to ship material from Upstate New York to the destination, warehouse it, and then truck it to meet that competition, and it meant a considerable cost to us, and our price was not made up of a price at the mill, plus freight to destination plus trucking. That isn't what we got paid. We got paid what the other company which was located in that area figured was its cost at the mill, plus a trucking charge.

Justice Stephens: Then if I understand you, your answer to Mr. Bromley's question is that you did not favor the extension of trucking areas, is that right?

The Witness: We did not.

By Mr. Bromley:

Q. Now that was true, generally, as to all licensees, wasn't it, Mr. Lenci? A. Well, I can't speak for the others, because some were in the same situation that we were in, and others were in the position of having plants in one or more of the metropolitan areas.

4549 Q. But at least so far as you were concerned, if you could have made the determination you would have abolished trucking altogether? A. Yes.

Q. At the prices fixed by USG? A. Yes.

Q. Because you felt that the prices fixed did not properly reimburse you for the expense of the trucking service? A. That is correct.

Q. Now in connection with your testimony the other day that you were confused as to the rights which the owner of a patent had, to control the patented product, wasn't your confusion due to the fact that you then believed that USG could withdraw the consent to Kelley, and that Kelley could refuse to sell Structural, but you did not appreciate that those actions could not have been taken as the result of a concerted agreement among the companies concerned? A. I didn't quite understand that.

Q. Well, I will withdraw it.

You told us the other day at page 4415 that you thought that the ownership of a patent carried the right in the patent owner to control the product even to a resale, do you remember that? A. Yes, at that time I did believe that.

Q. Well, you thought therefore, then, did you not,
4550 that not only could USG withdraw its consent to Structural, I mean not only could USG withdraw its consent to Kelley to sell Structural, and not only could USG stop selling Structural, but USG and anybody else could agree that that could be done? A. Yes.

Q. And I ask you again, you did not appreciate the distinction that while USG had a perfect right to withdraw its consent, and Kelley had a perfect right to refuse to sell, that that could not be done as a result of a concert of action among those companies? A. That is true.

Q. Now did this impression of yours, to which you testified on page 4415, arise because of anything that was said to you by anyone connected with USG? A. No, it was a fixed idea, apparently, that I had in my own mind, and had had for years, regarding patents. I must have read something that misled me, at some time, about it, and I had that idea.

Q. You didn't get that impression as the result of anything that was said or done at any licensee meeting, did you? A. No.

Q. And you didn't get that impression as the result of any understanding or agreement that you felt you
4551 had with USG or anybody else, did you? A. No.

Q. Now when was it that your mind was disabused of that impression, if it ever was? A. Well, it must have been early in the 1930's. As to who did it, I don't know. I must have learned better, that is all.

Q. Wasn't it specifically, Mr. Lenci, at one of the very first licensee meetings held in 1932? A. It may have been. You see the first 1932 meeting was that one with the long list of complaints, wasn't it?

Q. Yes. Don't you remember that it was Mr. MacLeish who told you what the law was in this respect? A. I think maybe he did mention it.

Q. And don't you remember that Mr. MacLeish explained that to you shortly after this first licensee meeting which occurred in October, 1932, as I remember it? A. I think maybe he did.

Q. And don't you recall that you had a discussion with Mr. MacLeish about this matter at a licensee meeting, late in 1932? A. I had forgotten it, but now that you mention it, it does seem familiar, it does recall it to my mind.

Q. Well, my information is that it was at the time of a licensee meeting, but either before or after the meet-
4552 ing itself—does that accord with your recollection, or doesn't it? A. I don't remember it that far, Mr. Bromley.

Q. You will note, Mr. Lenci—again coming back to Exhibit 440, in the second paragraph—that you refer to Structural's practice of selling board in small quantities. Do you see that? A. Yes.

Q. Isn't it the fact, sir, that from the time of the date of this letter, on, and as long as Structural was in business, it continued this practice and always sold board in small quantities where desired by its customers? A. I believe they did. We had continual reports from our salesmen.

Q. And don't you know, sir, that USG as a matter of fact, never withdrew its consent which it had issued to Kelley to sell to Structural? A. That is true.

Q. And don't you know, furthermore, that Structural during the entire period of its business existence continued to buy and sell gypsum board? A. Yes.

Q. Your company and you, yourself, sold board to Structural, did you not? A. Yes.

Q. You testified in the criminal trial at page 689
4553 that your company continued to sell Structural during this entire period, and right down to the date of the indictment, at least? A. That is correct. The "entire period" referred to there doesn't go back as far as 1932.

Q. When does it start? A. It takes up, I think, after they stopped buying from Kelley, and I think for a while

they bought from the U. S. Gypsum Company. I think we came in following that.

Q. That would be 1934 or 1935, then? A. It would be even later than that.

Q. So, for a period of years prior to 1940, at least, you continued to sell Structural? A. Yes, we sold them for three or four years at least.

Q. And they continued their sales practices and policies during that time just as they had existed prior thereto? A. That is right.

Q. I do not mean to create the impression that you stopped selling them in 1940. What is the fact, did you go on after 1940? A. We stopped selling them whenever it was that the American Cyanamid Company decided to discontinue their gypsum division; which was known as the Structural Gypsum Corporation.

Q. So that you continued to sell Structural right
4554 down to the time that Structural went out of the gypsum business? A. That is right.

Q. During the time that you did business with the Structural Company, did you ever have any understanding or agreement with them as to their resale prices for material purchased from you? A. No, we did not.

Q. And did you ever refuse to sell Structural at any time? A. No.

Q. Did you ever threaten them that you would refuse to sell them? A. No.

Q. And did you sell them in the Philadelphia area? A. Yes.

Q. I notice now that you testified in the criminal case that you sold Structural in the Philadelphia area beginning at the time that Kelley stopped selling them there, which was in the latter part of 1937—does that refresh your recollection as to the date? A. Yes, that is about right.

Q. Now when you were making the complaints to Board Survey which appear in Exhibits 440 to 446; inclusive, you knew that the Structural Company was aware of the fact that it was not bound by the provisions of any license
4555 bulletin, isn't that right? A. Yes.

Q. As a matter of fact, your salesmen reported to you that the Structural Company was publicizing the fact in order to get business, isn't that right? A. That is correct.

Q. In other words, they were publicly stating that their

situation was different from that of the licensee manufacturers because Structural's price was not controlled, and they could sell to a dealer at any price they wanted to? A. They made that statement to our salesman.

Q. Of course that hurt your business, didn't it? A. That is right.

Q. And isn't it the fact that you complained to Board Survey about it because you didn't at all trust the good faith of Kelley in making sales to Structural? A. Yes.

Q. Will you look at Exhibits 436-A and 437, please?

(Exhibits Nos. 436-A and 437 were handed to the witness.)

By Mr. Bromley:

Q. Do you see in the last paragraph of 436-A that your salesman Ehrlicher reports that Structural's salesman remarked that they now had the other manufacturers where they wanted them as they were not governed by any
4556 ruling set up by USG? A. That is correct.

Q. And in Exhibit 437, in the second sentence of the fourth paragraph, that fact is reported again to you, this time by Mr. Hough, is it not? A. That is right.

Q. Now will you look at Exhibit 463 and 464?

(Thereupon, Government's Exhibits Nos. 463 and 464 were handed to the witness.)

By Mr. Bromley:

Q. Look first at Exhibit 464. That letter, dated May 11, 1933, is a complaint by Board Survey against your company, isn't it? A. That is correct.

Q. And that complaint has to do with your sales to Connecticut Adamant Plaster Company, doesn't it? A. Yes.

Q. And Connecticut Adamant Plaster Company was one of these manufacturing distributors, like the Structural Gypsum, wasn't it? A. That is right.

Q. Now do you notice that in this document, in the last sentence, the situation is spelled out by Mr. Miller as follows: "This would hardly seem possible if your sales of patented board to the Connecticut Adamant Plaster
4557 Company, New Haven, Connecticut, had been made at the licensor's minimum price to you".

What Mr. Miller is talking about is the same type of thing as you and I have been discussing with respect to Structural, isn't it? A. That is correct.

Q. In other words, the evidence in support of this complaint, whoever made it, was that Connecticut Adamant had been selling board to Southbury Lumber Company at the licensor's minimum price, which was the dealer price, isn't that right? A. Yes.

Q. Now Southbury Lumber Company was a dealer, was it not? A. Yes.

Q. If Connecticut Adamant was selling to Southbury Lumber at the dealer price, that would cause one of your competing licensees to suspect that your price to Connecticut Adamant was lower than it should have been, isn't that right? A. That might have been.

Q. That is the precise nature of this complaint, isn't it? A. That is the nature of the complaint, yes.

Q. I am not trying to get you to admit that it was true. I am only trying to get you to admit that its nature was that it was inferred by whoever complained against you on the basis of what Connecticut Adamant was doing, that you must have been giving Connecticut Adamant a cut
4558 price. A. Yes.

Q. And that is the same kind of an inference which you were making against the Kelley Company as far as the activities of Structural were concerned, isn't it? A. Yes.

Q. Now look at Exhibit 463. This is another complaint by Board Survey against your company. It also involves the Connecticut Adamant Plaster Company, does it not? A. Yes.

Q. And it states that the Board Survey is advised that the manufacturing distributor, Connecticut Adamant, is offering patented board to a dealer, the New Haven Reserve Supply Company, f. o. b. their warehouse, in any quantity, at the dealer price—isn't that the nature of that complaint? A. Yes.

Q. Now in that letter the inference is not spelled out, is it? A. No.

Q. But you understood, didn't you, that that was a complaint, not against what Connecticut Adamant was doing, but against what you were charged with doing in your price to Connecticut Adamant? A. Yes.

Q. And anyone in the industry, including Mr. Miller, would so construe Exhibit 463, wouldn't they? A.
4559 That is right.

Q. Look at Exhibit 465, which I think you said was a follow-up of Exhibit 463.

(Thereupon, Government's Exhibit No. 465 was handed to the witness.)

By Mr. Bromley:

Q. Exhibit 465 is another letter from the Executive Secretary of Board Survey addressed to your company, isn't it? A. Yes.

Q. And do you notice that there Mr. Miller says, "May we have a reply to our May 8th letter in regard to your sales of patented board to the Connecticut Adamant Plaster Company, New Haven, Connecticut"? A. That is right.

Q. Now the letter of May 8th, referred to in Exhibit 465, is Exhibit 463, isn't it? A. Yes.

Q. But even without the letter of May 29, 1933, Exhibit 465, you would have understood, wouldn't you, that Exhibit 463 was a complaint against you in so far as your price to your customer, Connecticut Adamant, was concerned? A. Yes.

Q. And was not a complaint against what Connecticut Adamant was doing with respect to its customer,
4560 New Haven Reserve Supply? A. That is right.

Justice Stephens: We will take the noon recess at this time.

(Thereupon, at 12:15 o'clock p. m., a recess was taken until 1:45 o'clock p. m. of the same day.)

4561 AFTERNOON SESSION

(The trial was resumed at 1:45 o'clock p.m., pursuant to recess.)

Justice Stephens: Proceed.

Thereupon, GEORGE N. LENCI the witness on the stand at the time of recess, resumed his testimony as follows:

Cross Examination (resumed)

By Mr. Bromley:

Q. Mr. Lenci, do you recall that you testified, in connection with the Connecticut Adamant Plaster Company, that you had a talk with Mr. Kellogg, who was the head of that company? A. Yes.

Q. And do you recall that you said, at page 4287, your present recollection was that you asked Mr. Kellogg if he

were selling the New Haven Reserve Supply Company? A. Yes.

Q. Do you remember that at the criminal trial Mr. Kellogg was produced as a witness by the Government, and denied that anyone ever asked him about his prices or his practices? A. Yes, I remember that.

Q. Well, in the light of that testimony, do you still
4562 say that you, upon one occasion, did ask him about whether he was selling the New Haven Reserve? A. Well, as I recall it, when I first made that statement in the criminal case, I knew that I had talked to Mr. Kellogg about gypsum block, which was the occasion of my visiting him several times. He was selling our gypsum block for some work at the Yale University, and I thought it quite possible that I might have asked him that question about the New Haven Reserve Supply Company.

Q. Well, isn't that all you meant by your testimony on page 4287, that you thought it quite possible you might have asked the question? A. Yes.

Q. Well, that means, does it not, that you now have no recollection as to whether you did or not? A. I am not sure, no.

Q. Well, do you remember anything about the conversation at all, Mr. Lenci? A. Nothing at all definite as to the conversation, no.

Q. Well, if you did ask him whether he sold New Haven Reserve or not, you are pretty sure that you didn't mention USG in the conversation? A. I don't believe I did.

Q. Did you at that or any other time ever threaten
4563 to stop selling gypsum board to the Connecticut Adamant Plaster Company? A. No.

Q. Did you at that or at any other time ever suggest that USG might cancel its consent to your company to sell the Connecticut Adamant Company? A. No.

Q. Now these questions have had to do with the New Haven Reserve Supply Company—you realize that, don't you? A. Yes.

Q. And you remember, don't you, that among the exhibits there was a complaint made against you based on what Connecticut Adamant Plaster Company was doing with regard to its customer, the Southbury Lumber Company? A. Yes.

Q. Did you ever say anything to anybody from the Connecticut Adamant Company about their prices or sales or

practices with respect to the Southbury Lumber Company? A. I don't think I did.

Q. At page 4779, and running over to 4781, you were asked some questions, concerning the bulletin provision with respect to rebates, about the splitting of salesmen's commissions—do you recall discussing that topic? A. Yes.

Q. And your attention was called to the provision
4564 in the licensor's bulletin of February 6, 1939.

At page 4320, beginning in line 3, you testified that Mr. MacLeish said, at the October 17, 1932, licensees' meeting, that the employment of commission salesmen was a bad practice and that it would have to be discontinued. Do you remember that testimony? A. Yes.

Q. Now, isn't it a fact that all that Mr. MacLeish said was that rebating through the device of splitting commissions payable to manufacturers' salesmen was a bad practice and was prohibited by the bulletin? A. Yes. If you want a further illustration of that, we had two examples of it in our own company.

Q. Two examples of what? A. Of the two types of commission men. We had one by the name of Blanchfield, and another by the name of Parker. Blanchfield was paid a very substantial salary and a bonus for sales above a certain amount. Parker was on a nominal salary and was really mostly paid by commissions.

Now with Parker we had difficulty, and I think the evidence shows, either in this case or the other, that we were charged with rebating through Parker, and when we asked Parker about it he finally admitted that he had given cash rebates to certain dealers. Now that was the
4565 type of men that we didn't want in the industry.

Q. Now, when you say "we" do you mean the Ebsary Gypsum Company? A. The Ebsary Gypsum Company I am speaking of.

Q. When you testified, then, as you did at page 4429, that you let Parker go, you didn't mean that Parker was discharged because you understood that the bulletin required you to dispense with the services of commission salesmen, did you? A. We fired him because he admitted at that time, when we dismissed him, that he had given cash rebates to a customer, and we immediately let him go for that reason.

Q. Well, you did that, then, because you determined, as a matter of your own company policy, that that was what you wanted to do? A. We sure did, yes.

Q. And you did not do it because you thought you were required to do it by any provision of the bulletin? A. No.

Q. You now say, do you, that it was your understanding that no licensee had to discharge these commission men, and that their only obligation was to see to it that they did not rebate on the USG fixed prices by the device of splitting a part of their commission with the customer of the licensee?

A. I believe that was the intention.

4566 Q. I have noticed throughout the course of the trial that whenever testimony has been received about jobbers, or at least generally so, according to my recollection, it has appeared at some time or another that the particular company that was designated as a jobber was also engaged in the dealer business. Is that generally true of these jobbers as to whom you have been asked questions by Mr. Knuff? A. Some of them were, and some were not.

Q. At pages 4225 to 4227, you gave an illustration of why you would not sell a jobber at a discount in a large town where you had other dealer customers, and made reference to the fact that you found that a jobber would often take material which he purchased from you at a discount, and sell it as a dealer to the ultimate consumer, in competition with your own sales. Do you remember that? A. Yes.

Q. Now, am I correct in understanding that at the times when the USG bulletin permitted licensees to sell jobbers at a discount, the understanding in the trade of the word "jobber" was that they were a class of distributor whose customers were not contractors or consumers, but whose customers were dealers? A. Yes.

Q. And it never was intended, was it, or so understood by you, that a licensee could give a discount to a

4567 dealer under the bulletins? A. No.

Q. So that where you had a jobber who did two types of business, that is, jobbing in so far as his sales to dealers were concerned, and retailing in so far as his sales to consumers were concerned, it was always a difficult matter to know whether or not that individual was or was not entitled to a discount, wasn't it? A. Yes.

Q. And was it true that many of these jobbers would buy on the representation that their business was jobbing; then, having gotten the board from you or some other licensee at a discount, they would proceed to engage in business as a dealer and sell to consumers and contractors? A. Yes.

Q. And, of course, if they did that, since they received a discount on the dealer's price, they were enabled to under-

sell other dealers in competition with them for the same class of consumer trade? A. That is correct.

Q. And that resulted in complaints being made to you from those of your dealer customers who, not being jobbers, did not get a discount from you? A. That is right.

Q. In one of my questions, I think I said that these
4568 jobbers, when they resold to consumers, would make those resales in competition with you. That isn't correct, is it? A. In competition with the local dealers.

Q. In competition with the local dealers? A. Yes.

Q. And in situations where those local dealers were your customers, that would cause the local dealers to feel resentful at you because you had permitted the particular dealer to whom you gave the discount to receive a competitive advantage? A. Yes.

Q. You told us at one time, as I remember it, that as far as your company was concerned, you did business with very few jobbers? A. Yes, we had very few.

Q. Was one of the reasons for that this reason which I have just mentioned, that it was difficult to find out whether the so-called jobber to whom you gave a discount confined his business to the jobbing business? A. Well, it wasn't so much that as a policy with us that we felt we wanted to do business directly with the dealers. We were not particularly interested in selling to jobbers at all, because in the territories in which we did business we had our own salesmen, and a jobber had very little to offer
4569 us. We felt that we would much prefer to do business directly with the dealers' yards.

Q. Well, is it true, then, that you found, in the operation of your business, that a jobber, so far as gypsum board was concerned and gypsum products generally, performed no function which was of any value to you? A. He usually got in our way.

Q. And, of course, since his customer was the consumer or the contractor, he was in direct competition with you all the time, wasn't he? A. Yes.

Mr. Bromley: I withdraw that question, I misspoke myself.

By Mr. Bromley:

Q. And since the jobber to whom you sold at a discount sold dealers as his customers, he was in direct competition with your company in the selling of board? A. That is correct.

Q. And you felt, didn't you, that to give him a discount, in your situation, would be, in effect, giving him money for nothing? A. Yes.

Q. Did you ever find that your sales coverage of your territory was so slender that you needed your sales efforts to be supplemented by jobbers' activities? A. Not in the areas where we operated.

4570 Q. You said that there came a time when USG, in its price bulletins, eliminated the jobber's discount, and fixed the price to jobbers at the same figure as the dealer's price, didn't you? A. Yes.

Q. And you have told us, I believe, that you never knew of any understanding or agreement with USG, or anyone else, at any time, that this would be done? A. They did it on their own initiative, and notified us through the bulletins.

Q. Now, of course, that bulletin, you understood, applied only to patented board? A. That is correct.

Q. And it is the fact, isn't it, that your company has always, to some extent at least, given a jobber discount to real jobbers, so far as plaster and other gypsum products which were unpatented are concerned? A. That we did give discounts to dealers?

Q. Yes. A. Only in an extremely limited way, because as I said before, we had very little business with jobbers, through jobbers.

Q. I should have made it plain to you that my question was that you have always, during this period, sold plaster to jobbers, whenever you have done so, at a dis-

4571 count? A. Yes.

Q. I think you inadvertently, or I, perhaps, used the words "sold to dealers"—you meant jobbers? A. Yes.

Q. And isn't it the fact, Mr. Lenci, that right up to the present time you have given a jobber discount on plaster to Mr. Spease of the Fairmont Wall Plaster Company? A. Yes.

Q. And when did you start to do business with Mr. Spease, do you remember? A. It was when the Oakfield Gypsum Company was taken over by National, whatever the date was.

Q. About 1937 or 1938, wasn't it? A. Yes.

Q. Do I understand you to say now that ever since that time you have sold plaster to the Fairmont Company at a discount? A. That is correct.

Q. And that discount has been about 15 percent, hasn't it? A. About that, yes.

Q. Will you look at Exhibit 431, please?

(Government's Exhibit 431 handed to the witness.)

By Mr. Bromley:

Q. Will you look at the second paragraph of Ex-
4572 hibit 431, please? A. Yes, sir.

Q. Now when Mr. Turner, the writer of this memorandum, your sales manager, wrote you that it was his understanding that there were not to be any more jobbers, didn't you understand by that sentence merely that under the bulletin the discount to jobbers had been eliminated, so far as your sales to jobbers were concerned? A. Our sales of board.

Q. Your sales of board? A. That is correct, yes.

Q. And you did not understand Mr. Turner to be advising you that he understood that you couldn't sell to jobbers any more on any basis, did you? A. No.

Q. At page 4316 of your direct testimony, beginning at the top of the page:

"Q. Do you say that it was a matter of frequent discussion, the jobber situation? A. Yes."

You only meant by that answer, did you not, to say that price cutting by licensees, in their sales of board, by giving to jobbers discounts not permitted by the bulletin, was a matter of frequent discussions? A. That is correct, yes.

4573 Q. And in that same exhibit, Exhibit 431, will you look at the last two paragraphs?

In those two paragraphs you were complaining about USG, weren't you? A. No, in the fourth paragraph from the top I am complaining about USG.

Q. That is the one I mean, the last two paragraphs. Oh, I see what you mean. A. In that paragraph only.

Q. You were complaining about USG? A. Yes.

Q. What was the complaint? A. Our complaint was that Mr. Baxter, who was connected with the Samson Plasterboard Company of the USG, had made a cut price on a sale of 2 truckloads of board to the New Broadway Lumber Company. That was a straight complaint about a cut in price, that he had sold the board at $30.61 instead of whatever the correct price should have been at that time.

Q. Now the correct price for that transaction would be

the price set in the applicable bulletin for delivery by truck in that area, wouldn't it? A. Yes. I see a pencilled memo at the side there, reading "$33.25", and I would take it that that was probably the correct price for a transaction of that kind at that time.

4574 Q. And by "correct price", you mean— A. (Interposing) The established bulletin price.

Q. And the $30.61 that is mentioned in typewriting in that paragraph was the carload price, wasn't it? A. That is correct.

Q. That is to say, it was the price applicable if Baxter had sold a full car of board? A. That is correct.

Q. Then the price would have been $30.61 per thousand square feet? A. That is right.

Q. But if the sale, as is alleged here, was merely of two truckloads of board, under the bulletin USG should have charged the customer $33.25? A. Yes.

Q. So you say that that is an instance of a straight price cut, a sale below the price fixed in the bulletin? A. That is correct.

Q. Not by any indirect means, but by a direct means? A. Very direct.

Q. You testified, I believe, that up until the bulletin change in the jobber price in August, 1930, it was the practice of the industry to give jobbers a 10 percent discount? A. I think that is what it was.

4575 Q. Will you look at Exhibit 428, please?

(Government's Exhibit No. 428 was handed to the witness.)

By Mr. Bromley:

Q. When you wrote that letter, Mr. Lenci, to Mr. Henning, isn't it the fact that you didn't know whether the Teachout Company, of Akron and Cleveland, was considered by the trade as a jobber or not? A. That is true, I didn't know anything about them at all.

Q. And for all you knew, they might have been a dealer exclusively, and therefore not entitled to any discount at all from you; isn't that right? A. Yes.

Q. Now your information was, as expressed in the last paragraph of Exhibit 428, that Teachout was a wholesaler and sold only to lumber dealers? A. Yes, that apparently was the information that was given to me, and I am asking Mr. Henning for his experience or interpretation or understanding as to whether Teachout was a jobber or not.

Q. Now, if Teachout had been a wholesaler and confined his sales to lumber dealers, then he would have been considered a jobber, wouldn't he? A. Yes.

4576 Q. The answer, Exhibit 428-A, in the last paragraph, you understood that sentence to mean that while Teachout had formerly acted as a jobber, he was no longer doing so because his supplier had ceased selling him at a discount?

(Exhibit 428-A handed to witness.)

A. Yes.

Q. Did you know, Mr. Lenci, that that was because Teachout had gone into the retail business? A. I didn't know anything about them at all.

Q. Did you ever sell Teachout at any time, either as a dealer or as a jobber? A. Never, before or after.

Justice Stephens: Before or after what?

The Witness: The inquiry.

By Mr. Bromley:

Q. The inquiry contained in Exhibit 428, is that what you mean? A. Yes.

Q. And will you look at Exhibit 429, please.

(Exhibit 429 handed to the witness.)

By Mr. Bromley:

Q. The purpose of your inquiry of Mr. Henning in that exhibit was to find out whether the Winslow and Varick companies, as a matter of fact, were in the jobbing business and therefore entitled to a discount, wasn't it?

4577 A. Yes.

Q. And you also wanted to know the same information with respect to the Culver Company in Brooklyn, did you not? A. That is right.

Q. Now, at some point in your testimony you mentioned the name Coeyman & Company, do you remember that? A. Yes.

Q. And you testified, or some exhibit shows, that you made an inquiry about Coeyman, or stated that you were selling Coeyman as a jobber? A. His name was included in that list of three or four jobbers which we said we were selling at the time.

Q. And will you look at Exhibit 421?

(Exhibit No. 421 handed to the witness.)

By Mr. Bromley:

Q. In that letter you list Coeyman and Raymond and Eastern Builders Supply as three companies which your company considered as jobbers, don't you? A. Yes.

Q. Wasn't this man Coeyman a man who was considered in the trade as a broker? A. Well, it is hard to draw the line between one and another.

Q. Did he have a warehouse, do you know? A. No, he had no warehouse.

4578 Q. Well, a man couldn't perform a jobbing function without a warehouse, could he, Mr. Lenci? A. Not very well, no.

Q. And wasn't that same thing true of the Eastern Builders Supply of Baltimore, weren't they merely brokers, without warehouse facilities? A. I believe they are.

Q. Weren't they in 1929? A. I believe they were.

Q. And the G. B. Raymond Company of Long Island City, as a matter of fact that company was a dealer, wasn't it? A. Yes.

Q. That means that they were engaged in the retail business? A. Yes, they were.

Q. And as a matter of fact, the Raymond Company never was interested in the sale of gypsum products, was it? A. They were primarily sewer pipe people, clay products.

Justice Garrett: That term "broker" is a new term here, isn't it?

Mr. Bromley: That is a new term.

Justice Garrett: It hasn't been introduced here before?

Mr. Bromley: That is right.

4579 By Mr. Bromley:

Q. Will you tell us, please, what a broker is in the gypsum board business? A. Well, you could use Coeyman as an illustration. He had no yard, but he had certain friends among the dealers and he could go to them and get an order, and then turn it in to a manufacturer. In some cases he carried the credit himself; in others, he merely turned it over to the manufacturer and then got his discount on the sale, his commission on the sale.

Justice Jackson: And the delivery was made by the manufacturer to the dealer direct?

The Witness: Yes, that is correct.

Justice Garrett: Now in that letter, Exhibit 421, going to the third paragraph, you state:

"At the June 6th meeting in Chicago you asked me to send a list of customers who we consider as Jobbers or Distributors and these are as follows"—and then you list those three which you just mentioned.

Now you state in your testimony that Coeyman was a broker and that Raymond & Company were brokers?

The Witness: No, the Eastern Builders Supply Company were brokers.

Justice Garrett: When you wrote this letter which did you regard these people as, jobbers or distributors? We have this new expression here, "broker".

4580 The Witness: I am sorry to hear the word "broker" brought up, because that means one more thing to try to explain.

I honestly can't tell the difference.

Justice Jackson: Didn't you mean those were the men to whom you were selling at a discount?

The Witness: That is it, exactly. In other words, they were an in-between party between the manufacturer and the dealer, under whatever title they might be considered.

By Mr. Bromley:

Q. Well, so far as the bulletins were concerned, Mr. Lenci, the only term ever used in them was "jobbers", isn't that right? A. Yes.

Q. Neither the term "broker", nor the term "distributor", according to your best recollection, was ever used in a USG price bulletin, was it? A. I am very sure that the term "broker" was never used, and I don't think the term "distributor" was used, except in connection with "manufacturing distributors".

Q. At pages 4125 and 4126 of the record, you were asked, and answered, some questions about the bulletin provisions governing trucking and trucking areas. The only provisions ever set up by USG in its bulletins, concerning these matters, applied solely to patented gypsum board,

4581 according to your understanding, isn't that so? A. Yes.

Q. And wasn't it your understanding that so far as these bulletins were concerned, in their limitation of trucking areas, that is their definition of trucking areas, that they merely prescribed those areas in which, at that time, it had been found by the industry to be economic to incur extra trucking expense in order to make sales? A. Yes, that that was the United States Gypsum Company's under-

standing that it was economic in those territories. We didn't agree with them.

Q. And you never had any understanding or arrangement with USG as to whether the bulletins would define trucking areas or trucking charges, did you? A. No.

Q. And whatever the bulletins contained with respect to those matters from time to time, was determined by USG wholly independently of you? A. Absolutely.

Q. And wasn't the fixing of a price in the bulletins for a truckload delivery in a so-called trucking area, in all respects similar to the fixing of a specific price for a carload, for instance? A. Yes. Let me use a specific example.

The USG, say in 1940, established a price of $14.10
4582 on gypsum lath delivered in the New York City area, and if they got beyond that, farther up the Hudson River, it would jump to $14.25. Now that did not represent a mill price plus freight to destination, but a price below that. So wherever these trucking areas were established they meant a cut in what we would normally secure for that business.

Q. I thought you testified—or at least you created the impression in my mind—that you construed the bulletins as prohibiting you from trucking into counties or areas not specified in the bulletins. A. Yes, I did understand them that way.

Q. Well, didn't you understand that the result of the fixing of the price for trucking areas merely meant that if you saw fit to truck outside of those areas, you were obligated to charge the customer a price which should be composed of the mill price, plus the LCL freight for the quantity delivered by truck? A. Well, that would be purely an academic question, because we did not like this trucking, and we did not want to do it. So I don't know how we would have interpreted it.

Q. Well, it would be purely an academic question because the less-than-carload freight rates fixed by the Interstate Commerce Commission were so high that nobody would pay that for trucking service, is that what you mean? A.

I meant that our company wasn't interested in devel-
4583 oping business of that kind.

Q. Well, I still am unable to understand why you construed the bulletins as prohibiting you from making a delivery by truck if you wanted to, into an area for which a price was not established by the bulletins, in the manner which you have described. A. Well, suppose we had made a

price outside of the trucking area, that would have been a cut below the prices which were established for the carload shipments into that specific territory and would have been construed, I think, by the licensor, as a price cut on our part.

Justice Jackson: Unless you charged, for your trucking service, the same as you would charge by freight?

The Witness: That might be so.

Mr. Bromley: That is all I am trying to find out.

The Witness: That is correct, then, yes.

Justice Stephens: Let me get your state of mind clearly. Did you understand that the effect of the bulletins was to legally prohibit you from trucking into these areas, or that in view of the price arrangements for trucking, as compared with carload or less-than-carload deliveries, as an economic matter you could not successfully truck into those areas?

The Witness: That is correct, we could not economically do it.

By Mr. Bromley:

4584 Q. Will you look at Exhibit 457 again, please, Mr. Lenci?

(Thereupon, Government's Exhibit No. 457 was handed to the witness.)

By Mr. Bromley:

Q. Don't you remember that the dealer, Louis Brooks, referred to in that exhibit, was located in Washington, New Jersey, which place was outside of any area designated as a trucking area for which a price was fixed by the USG bulletins? A. Yes.

Q. Now there was, in the bulletins, a price for a carload of board fixed which would cover Brooks in Washington, New Jersey, wasn't there? A. Yes.

Q. But a truckload was less than a carload, wasn't it? A. That is correct.

Q. So that the price for the delivery to Brooks in Washington, New Jersey, of less than a carload, whether delivered in a freight car or a truck, would be the price provided for in the bulletin as the less-than-carload price, wouldn't it? A. Yes.

Q. And that is the reference in the second paragraph of Exhibit 457? A. That is right.

Q. That is $36.28 per thousand square feet is the
4585 price fixed by the bulletins for sales of less-than-carload lots? A. That is my understanding.

Q. And in this letter of Mr. Miller's to you, he points out to you that this is the price which should have been charged under the bulletins for a truckload delivery? A. Yes.

Q. And didn't you understand, then, that that principle applied to all areas not specified in the bulletins as trucking areas? A. Yes.

Q. In other words, if you were permitted to sell lath at $15, delivered by truck in Metropolitan New York, and no price was set for delivery by truck in Westchester County, the bulletins nevertheless required you to charge mill base, plus less-than-carload freight for the delivery of a truckload into Westchester County? A. That probably would have been the case if no price had been established for Westchester.

Q. You mean by that, if no truck price had been established for Westchester? A. Yes.

Q. And when you said at page 4145, beginning at line 8, in answer to this question:

"Q. Is it your understanding that this meant there would be no truck deliveries to the dealers' warehouses out
4586 of Charlestown, Massachusetts? A. That is right."

When you said that, that answer was either inaccurate or not complete, wasn't it? A. What was that in connection with?

Q. That was in connection with Exhibit 417, Mr. Henning's letter to you of July 26, 1929, which was a price bulletin, and which set a price for truck deliveries to dealers' warehouses.

(Thereupon, Exhibit No. 417 was handed to the witness.)

By Mr. Bromley:

Q. In the last paragraph of Exhibit 417 you will notice it says:

"Plasterboard not delivered by our trucks to dealers warehouses. Please disregard the minimum price for delivery by truck given in our letter of July 25".

Didn't you understand that to mean that the licensor was fixing no price for truck deliveries in Charlestown, Massachusetts? A. Yes, they established, for Charlestown, Mas-

sachusetts, which was the location of their Boston mill, these pickup prices.

Q. What prices are you talking about when you
4587 mention "pickup" prices? A. The next to the last paragraph reads:

"Minimum prices for material picked up at Charlestown Mill by dealers".

Q. That meant that the licensor established by this bulletin a price per unit of a thousand square feet, where a customer came to the mill and got the material himself, is that right? A. That is right.

Q. Didn't the bulletins also provide that there should be no special price for truckload deliveries to Charlestown, Massachusetts, in the sense in which trucking prices had theretofore been established in the bulletins? A. That is right.

Q. Now you told us, didn't you, that the price that was established for trucking deliveries was not mill base plus freight, but was calculated on a more or less arbitrary basis of mill base, plus some arbitrary figure designed, partially or wholly, but only in a general way, to cover the trucking costs? A. That is right.

Q. Didn't you understand this bulletin, Exhibit 417, to notify you that there was no special price set for truckload deliveries in Charlestown, Massachusetts? A. Yes.

Q. And didn't that result in notifying you that if
4588 you, nevertheless, wanted to deliver by truck in Charlestown, the price which you were obligated to charge the customer for that delivery should be made up of the mill base price, plus the freight calculated at the less-than-carload freight rates on the quantity delivered by truck? A. Yes.

Q. I notice that at page 4441 of the transcript, at the bottom of the page, you were asked this question and you gave this answer:

"Q. And you might consider that as the zone nearest the mill, and then there was a zone farther away from the mill in which trucking was not permitted; is that correct? A. That is correct".

Didn't you mean by that merely that trucking was not permitted at the price fixed for the area nearest the mill? A. You are speaking of Upstate New York now?

Q. Yes. A. Yes, that is right.

Q. And when you said on page 4442 as follows:

"A. But it was the practice of both the Paragon Company and the American Hardwall to make truck deliveries throughout the territory adjacent to their mills, and we were anxious to be put in a position to compete with those two companies"—you merely meant that you wanted the bulletin to set a price for truck deliveries in those
4589 areas which would enable you to sell on that basis in competition with these Paragon and Hardwall companies? A. That is correct.

Q. At page 4411 you testified with respect to a complaint made against the Certain-teed Company which involved the sale at the truckload price of an amount of board less than the minimum quantity specified in the bulletins for that price. Now isn't the situation with respect to the minimum quantity provisions of the bulletins similar to the situation which we have just been discussing regarding trucking areas? A. Yes, the bulletins provided for such-and-such a price on a specific quantity.

Q. And those minimums generally, over the years, were either 7,500 square feet, or 10,000 square feet, or 5,000 square feet, somewhere in that neighborhood? A. They roughly represented a truckload, yes.

Q. And the price that was fixed was a special price fixed for that amount of material delivered in a truck, wasn't it? A. That is correct.

Q. Now you realized, didn't you, that at all times you could deliver less than that if you wanted to, but you were subject to the restriction that you had to charge a higher price for it? A. That is right.
4590 That price being the price which would result from adding the less-than-carload freight to the mill base applicable to the transaction. A. Yes.

Q. You said at page 4638, in answering a question of Mr. Knu[illegible]s with respect to the 7,500 foot minimum, as follows:

"But you could not go below the 7,500 feet, as I recall it."

Now in giving that answer you meant to say that you could not deliver less than the 7,500 feet at the price fixed for the 7,500 feet in the bulletin, did you not? A. That is right.

Q. Now so far as the pricing system in the gypsum board business is concerned, isn't it true that all that the bulletins

did in providing for a price made up of a mill base plus freight, was to continue to use the practice which had been common in the industry for many, many years? A. Yes.

Q. Do you remember that Mr. Knuff referred to this as a "basing point system"? A. Yes.

Q. Well, isn't it the fact that over the years the mill base provisions were extended to all mills, not only USG mills, but to all mills? A. Yes. It always seemed to me that that phrase, "basing mills" was very misleading,
4591 because most people think, when you speak of a "basing mill", of the Pittsburgh steel basing point where, no matter where anybody ships from, they base it on Pittsburgh. But this is the exact opposite. We base it on the nearest mill to the destination, the lowest price to the customer, rather than an arbitrary high point.

Q. So that the system, rather than being a basing point system, is really nothing but a freight equalization system? A. It is freight equalization based on the mill having the cheapest freight rate to the destination in question, at the time.

Q. And that merely results in the customer always getting the lowest possible price, no matter from whom he buys? A. Yes, and that worked very much to our disadvantage, but it was the way it was done.

Q. Well, sometimes that would work to your advantage, wouldn't it? A. Not in one time out of a hundred, because our plant in Upstate New York was in the immediate area where National, USG and Certain-teed had plants. So we had no advantage there. If we shipped into Boston we had to meet the prices established by the companies basing their prices on Boston. If we went into Portland,
4592 Maine, we had to meet the competition arising at Portsmouth, New Hampshire. If we went into Philadelphia or eastern Pennsylvania, we had to meet the producers in Philadelphia. If we came to Washington, we had to meet the prices established by Philadelphia. If we went into Ohio, we had to meet the producers who had plants at Gypsum and Port Clinton, Ohio.

In other words, we were in the spot of always meeting a lower price established by the companies who happened to have a mill nearest to that destination.

Q. So that the situations were very few in which you got the advantage of this freight equalization system? A. Yes.

Justice Stephens: Weren't your competitors, or some of them, at the same disadvantage, when they had to ship from territory which was near your mill?

The Witness: The one which suffered the most was Certain-teed, because their situation was about the same as ours, they had a plant in Upper New York State, and none near the seaboard. The National and USG had mills on the seaboard.

By Mr. Bromley:

Q. Now at pages 4105 and 4106 your attention was called to Government's Exhibit 404, which again was a price bulletin, I believe, and particularly to the provision on page 2 thereof, which stated: "Truck deliveries from New
4593 Brighton Mill add $3.00 to New Brighton base prices, or $2.00 to Oakfield delivered carload prices."

On page 4106 of the transcript you said that you did not know what the business reason for that differential was. Now isn't it a fact, Mr. Lenci, that obviously the $3 surcharge which was added on to the New Brighton Mill price was to enable the licensee making a sale and delivering by truck, to recover some part or all, of the trucking cost and the cost of the additional service in loading and handling quantities as small as truckload quantities? A. Yes.

Q. That provision on page 2 of Exhibit 404 is an example of the way trucking area prices were established generally by the bulletins, isn't it?

Justice Jackson: Do you mean page 2 or page 3 of that exhibit?

Mr. Bromley: I thought it was at page 2.

Justice Jackson: I believe it is on page 3, right at the end of the exhibit.

Mr. Bromley: No, your Honor, it is at page 2.

Justice Stephens: What line from the bottom? I haven't been able to place it yet.

Mr. Bromley: The sixth line from the top. It reads:

"Truck deliveries from New Brighton Mill add $3.00 to New Brighton base prices, or $2.00 to Oakfield
4594 delivered carload prices".

Justice Stephens: This is Exhibit 404?

Mr. Bromley: Yes, page 2, about six lines from the top.

Justice Jackson: You were previously examining on truck deliveries from Philadelphia, weren't you?

Mr. Bromley: I don't think so.

Justice Jackson: I guess I had it all twisted, that is all.

Justice Stephens: I have it now.

The Witness: If I can explain it, I think I could make it clear.

Take, for instance, #1 gypsum wallboard—at the bottom of page 1—the price f.o.b. New Brighton is $22.60.

Turning to page 2 it says to add $3 to this in order to make the truck delivered price, or, to take the similar price on #1 wallboard of $20 f.o.b. cars Oakfield, plus freight to destination, plus $2—

Justice Stephens: (Interposing) Where is the $20?

The Witness: The $20 is near the top of the first page of the exhibit.

Justice Stephens: I see.

The Witness: Then the customer would be quoted the lower combination of the two. That was the intention of that.

Justice Stephens: What do you mean by "the lower combination of the two"?

The Witness: If $20.60, plus $3 was less than $20,
4595 plus freight, plus $2, you would quote that, you would quote whichever was the lower of the two.

Justice Stephens: To what point?

The Witness: To whatever point the delivery was to be made.

Justice Stephens: I see.

By Mr. Bromley:

Q. I believe you made a mistake in your answer. You said $20.60 when you meant $22.60, did you not? A. Yes, I should have said $22.60 in referring to New Brighton.

Q. So that this paragraph on page 2 meant that you were permitted to sell board, and deliver it by truck, at $25.60—that is the first effect of the provision, isn't it—$3 plus $22.60? A. That is right.

Q. Or, if you had a plant up near Oakfield, and you wanted to, you could charge the customer the Oakfield price of $20, plus the freight to New York, if your customer was in New York, which would be approximately $3, or so, plus $2? A. Yes.

Q. So that, as it worked out, the price on both bases would be about the same? A. In that particular case, yes.

Q. There might be some instances where, to figure
4596 it out on the Oakfield base would be lower than the New Brighton base? A. That might be so.

Q. And you were permitted to charge whichever you

wanted to? A. Yes, we were permitted to charge the lower of the two.

Q. Now you said at page—

Justice Stephens: (Interposing) Where does the exhibit say that you are permitted to charge the lower of the two?

The Witness: Well, naturally—

Justice Jackson: (Interposing) That word "or" does it—that is an alternative and not a connective.

The Witness: Naturally, we would quote the customer the lower combination of the two, and would be forced to do so for business reasons.

By Mr. Bromley:

Q. I started out to call your attention to the fact that at page 4106 you said you did not know the business reason for the $3 or $2 surcharges. You do know what that was, do you not? A. I do know what it was, yes. My memory is working a little bit better than it did the first day when we started out.

Q. What was the business reason? A. To give the customer the benefit of the lowest price.

Q. I am not talking about the alternative prices,
4597 Mr. Lenci. You were asked if you knew the business reason why a $3 surcharge was set by the licensor for truck deliveries, and you said you didn't know. A. Well, I don't know what was in USG's mind.

Q. Well, it cost the manufacturer some money to make delivery by truck, didn't it? A. Naturally.

Q. And it cost him some money to load the goods in the truck, didn't it? A. Yes.

Q. It cost him money to handle the goods, didn't it? A. Yes.

Q. Wouldn't you expect, if you were going to sell a customer and deliver by truck, that you should get a higher price than the mill base price? A. Certainly.

Q. Wasn't the $3 established by the licensor as a differential over the mill base price, to enable the licensees, in making sales by truck, to recover some of their delivery costs? A. Yes.

Q. Wasn't that the business reason for the $3 differential? A. I believe it was, yes.

Q. Now at page 4064 you were describing the
4598 situation in connection with your mill which you said was located at Wheatland, New York. And you told us that there were plants at Oakfield, and that Oakfield was about thirty-six miles from Rochester, and Wheatland

was about eighteen miles from Rochester; that Oakfield was on the New York Central, and Wheatland on the B. & O.—do you recall that? A. That is correct.

Q. And you were asked these questions and gave these answers:

"Q. You would ship your board from Wheatland to Rochester, but you would add the freight from Oakfield to Rochester, is that correct? A. At that time, yes.

"Q. And if you were selling board in Buffalo, you would likewise quote the mill price, plus freight from Oakfield, is that not correct, from Oakfield to Buffalo? A. Yes, that is the opposite illustration."

Do you recall what you meant by that? A. Well, that meant that our freight from our mill at Wheatland to Buffalo was higher than the freight rate from Oakfield to Buffalo, and we were absorbing a considerable difference in the cost of transportation, and that was opposed to the question there that from Wheatland to Rochester we had a slightly lower rate than the companies at Oakfield had to Rochester.

4599 So when you sold in Rochester you charged the dealer the mill base, plus the freight from Oakfield to Rochester? A. At the very start, but it wasn't long before that dropped back to the rate from Wheatland to Rochester.

Q. I am not interested in when it dropped back, I am trying to get an explanation of what you meant by, "that is the opposite situation". A. That is my explanation of that.

Q. Well, I still don't understand it. You meant, didn't you, that when you shipped to Rochester, you were paid by your customer, in the price, more than the actual freight? A. Yes.

Q. So that you made money in that instance? A. Yes.

Q. And from the bulletin requirement that your price to the dealer should be mill base, plus freight from Oakfield to Rochester, that resulted in an advantage to you? A. That is correct.

Q. And instead of having to absorb freight, you made some money? A. Yes.

Q. Over and above the freight that was paid? A. Yes.

Q. Isn't it true that as between Oakfield and Wheat-

4600 land, in the majority of instances the freight rates

are the same? A. They are identical, with very few exceptions.

Q. That is because Oakfield and Wheatland are close together? A. They are classified together as a rate base point.

Q. And being classified together, the freight rate from each place to most destinations is the same? A. To very nearly all, yes.

Q. So that the fact that the bulletin provided that the price to the dealer should be composed of the mill base plus the freight from Oakfield, did not seriously injure or prejudice you, did it? A. No.

Justice Stephens: The Court will take the afternoon recess at this time.

(Thereupon, a five-minute recess was taken, after which the hearing was resumed.)

4601 Justice Stephens: You may proceed.

By Mr. Bromley:

Q. At page 4407, Mr. Lenci, do you remember you testified about a complaint which you made against National, having to do with the sale by National of Maftex along with gypsum board? A. Yes.

Q. And you told us that Maftex was a fiber board like Celotex? A. Yes.

Q. And do you recall that you said there that your complaint was that National, in selling gypsum board to Axinn Brothers, a dealer, sold the board at the correct bulletin price but quoted an unusually low price on the Maftex board? A. Yes.

Q. Now so far as you were concerned, it was the fact, wasn't it, that National could sell Maftex at any price it wanted to? A. Sure.

Q. The thing that you objected to was their practice of selling it below their current market price in order, in that fashion, to effect an indirect rebate on the price of the gypsum board? A. That was my complaint.

4602 Q. You considered the abnormally low price to be, in effect, a partial gift made for the purpose of cutting the board price, didn't you? A. Cutting the gypsum board price, yes.

Q. And at page 4410, you testified with respect to another complaint that you made against National, having to do with the matter of advertising, you said, that is, the

giving away by National of boards for completing work in a customer's office.

What relationship did the gift of boards by National, to a dealer-customer, have to advertising? A. Well, it probably is an indirect connection, but we felt, that is, the Ebsary Gypsum Company felt, that anything in the nature of a gift of that kind was advertising, for the reason that the dealer finished up his office with these boards, and they would stand up there as being National Gypsum Company's boards. That, in a way, was advertising. In another way it was a gift, and in effect a cash rebate. So it was really two counts.

Q. Do you mean if a dealer finished the interior of his office with board manufactured by National, that a visitor to the office could read the trademark National on the board and would know that the dealer was using National board?

A. I wouldn't be surprised if the boards were iden-
4603 tified so that that would be true.

Q. And did you mean, then, that the manufacturer who made a gift of that kind for that purpose, to a dealer, might seek to justify it on the basis that he really was only paying the dealer for permitting an advertisement of his product to be made in the dealer's office? A. Well, in a way; but if they hadn't made him the gift, the dealer would have had to have used board for which he paid cash, and here he was using board that didn't cost him anything.

Q. Well, was it your position that the value of the board given to the dealer was worth more than the value of the advertising which the manufacturer supplying the board received? A. It was our feeling that the value of the board represented a rebate. That was the first thing in my mind when I made the complaint.

Q. And I wasn't quite clear about your explanation having to do with the painting of a dealer's buildings and fences. You said that that was sometimes done by licensee-manufacturers, and in your judgment accomplished an indirect price rebate on board sold to the dealer, didn't you? A. Yes.

Q. I thought you made some reference to the fact that sometimes the manufacturer would put a little sign
4604 on the fence advertising his particular products. A. That is correct.

Q. Was it your position that that little sign was put up there as a pretext for justifying the expenditure of the cost of the paint and the painting by the manufacturer? A. Yes.

I have one particular dealer in mind, and I am not going to mention the name, who had a good sized plot of ground. He had his office in the corner of the lot. He had a fence all along this side and all along this side (indicating). That whole fence was painted, and he charged that expense to one of the gypsum manufacturers, and the only thing the gypsum manufacturer got out of it was a small section of that fence that bore this manufacturer's name; and the dealer had previously asked us if we would do that for him, and we refused.

Q. And you thought that the cost incurred by the manufacturer, of painting that long fence on two sides of the lot, greatly exceeded the value of the advertising which the manufacturer got from the little sign on it? A. Yes, it certainly did.

Q. And you, therefore, construed that as an indirect way which the manufacturer was using to accomplish a rebate on the price of board purchased by that dealer? A. Yes.

4605 Q. You testified at pages 4443 and 4444, with respect to the relations between the Kelley Company and the Structural Company, that in 1932 Structural made an arrangement to have a dealer locate himself in their plant and sell material to contractors or consumers, and that you thought, as I understood you, that that was a violation, by the Kelley Company, of the price bulletins. Do you recall that? A. Yes.

Q. Do you remember that you testified about this instance during the course of your examination in the criminal case, Mr. Lenci? A. I believe so, yes.

Q. Didn't you there testify as follows, with respect to this instance, beginning at page 681:

"Q. Well, let's see, Kelley had the permission of the licensors to sell a distributor at a discount only if the distributor were acting as a wholesaler and not a retailer, isn't that right. A. That is true, yes."

That is correct, is it not? A. Yes.

Q. The next question:

"Q. Now Kelley was a licensee, wasn't he?"

And you answered:

"Yes."

4606 "Q. And Structural was a manufacturing distributor, wasn't he?"

And you answered:

"Yes."

That is correct, isn't it? A. Yes.

Q. Now it is the fact, isn't it, at this time, and in fact at all times during which Structural was in business, that Structural's normal business was that of a distributor selling to dealers? A. Yes.

Q. So that if Structural should suddenly go into the dealer business and commence to sell contractors, then your position was that Kelley had no consent from USG to sell Structural at a discount; is that right? A. That is right.

Q. Now, let's illustrate that by an extreme case. Suppose Structural, in 1932, was a manufacturing distributor, its customers would be dealers, wouldn't they? A. Yes.

Q. And it would get a 12-1/2 or 15 percent discount off the dealer price from whatever licensee-manufacturer was selling to Structural? A. Yes.

Q. Now, suppose Structural overnight should
4607 change the character of its business so that it no longer sold as a distributor to dealers, but commenced to sell to the ultimate consumer, the contractor or the consumer; it was your position, wasn't it, that if that happened, Kelley had no more right to give Structural a discount than Kelley would have the right to give any dealer a discount, under the bulletins? A. That is right.

Q. And the thing that you were complaining about in 1932 was that Kelley, in effect, was changing the character of its business to a partial extent through the device of going into the dealer business and selling contractors and consumers?

Justice Jackson: You didn't mean Kelley, did you?

Mr. Bromley: I should have said Structural.

The Witness: Structural, yes.

By Mr. Bromley:

Q. That is what your complaint was, isn't it? A. Yes.

Q. Now, I was under the impression that what Structural had done was to go into the business of selling as a dealer at its manufacturing plant, by utilizing one of its own employees to make retail sales. A. Well, they used a dummy name, I don't know whose it was, I don't remember what it was at the time.

4608 Q. They used a dummy name? A. They marked off, as I was told, a part of their warehouse with a name, and who that party was, I haven't any way of knowing.

Mr. Steffen: Is this all based on hearsay? Do you have any other information but what you were told, Mr. Lenci?

The Witness: I was told by our salesman.

Mr. Steffen: We object to that as hearsay, Your Honor.

Mr. Bromley: It seems to me it is material in connection with the complaint which he made, according to his testimony at page 4443, in this case, against that situation.

Justice Stephens: In other words, you are showing his knowledge or understanding of what Kelley did, as bearing upon the meaning of his previous testimony?

Mr. Bromley: Yes, sir.

Justice Stephens: The objection is overruled.

Mr. Steffen: It is not offered for the truth of the statement that the dealer was a dummy dealer? He may have been a bona fide dealer, so far as this testimony goes.

Justice Stephens: Well, I understand the cross-examination is merely referring to this information based upon hearsay, to show what the state of this witness' mind was as bearing upon the nature of his complaint. That
4609 is proper.

Mr. Steffen: That is right.

By Mr. Bromley:

Q. Well, whatever the true facts were, your information was, and your complaint was, that in some fashion, direct or indirect, Structural was changing the character of its business from that of a distributor to that of a dealer? A. That is correct.

Q. And your position was that if that was the fact, Kelley was violating his license if Kelley gave Structural a discount? A. Yes.

Q. Now I believe in one of your notes at licensee meetings, you wrote down the words, "Kelley to straighten out." Do you recall that, in connection with this complaint—and I refer specifically to Exhibit 479 for Identification, and your testimony with respect to this note of yours, "Structural dealer at mill—Kelley to straighten out at once". Do you recall that? A. Yes.

Q. That is something you said you brought up at the licensee meeting of December 13, 1932? A. That is right.

Q. Now, when you said "Kelley to straighten out
4610 at once", didn't you mean merely that Kelley was to find out whether, as a matter of fact, Structural had changed the character of its business to the extent indicated? A. Yes.

Q. You didn't mean, did you, that Kelley was to straighten it out by coercing or compelling Structural to go out of the dealer business? A. We couldn't expect to do that.

Q. All you meant was that Kelley was to find out what the fact was, and if it turned out that Structural was operating as a dealer, then it was up to Kelley to cease giving the discount to Structural? A. Yes.

Q. And in the same exhibit, Exhibit 479 for Identification, there was, as I recall it, a mention of the sales tax, and you testified that some questions were asked about the then pending proposal for a national sales tax? A. Yes.

Q. Isn't it the fact that the only thing you wanted to find out was how your price on patented board, under the bulletins of USG, would be affected if a sales tax law were passed? A. That is what I wanted to know, yes.

Q. You also testified, I believe, that you had made a note at this time in connection with the contemplat-
4611 ed sales tax, "All sales to be subject to the addition of national or other sales tax if passed (this also applies to all products, and orders taken should so specify)."

You didn't intend to indicate by that that you thought the licensor had any right to make any provision as to the price of any product other than patented gypsum board, did you? A. No.

Q. I notice this last note "this also applies to all products, and orders taken should so specify", is in parenthesis. Doesn't that indicate that that was something you put on for your own information, and was not discussed at the meeting? A. That is correct. In connection with that sales tax, the reason it was in my mind is that for a number of years we had a plant in Canada, and did business under the Canadian sales tax, and it was the custom there, well understood by both the manufacturer and the customer, that the tax was to be added onto the face of the invoice; and what I had in mind, when I was asking about that, was if that would be the same practice in the United States, if the other people understood it the same as I did, if the tax came through.

Q. Now, at page 4505, you testified with regard to selling the Paragon companies and the American Hardwall,
4612 and you were asked these questions and gave these answers:

"Q. And the position that you took was that board should only be delivered by Ebsary to Oakfield; is that correct? A. That is correct.

"Q. And that it should not be shipped from the Ebsary plant for the account of Paragon, or Paragon Plaster & Supply, or American Hardwall? A. Yes, that was our argument.

"Q. What disposition was made of that complaint at that time? A. I think Mr. Henning said that he was going to consider it, and would make that change.

"Q. And would make the change? A. Yes.

"Q. Do you know whether the change was ever made? A. I don't think it was."

Now when you used the word "change", you only meant by that to indicate that USG was going to check with its licensees to make sure that no licensee was giving a manufacturing distributor's discount on board to these three companies, the Paragon companies and American Hardwall; isn't that right? A. Yes, but I believe that all three of those companies were getting a discount.

4613 Q. Well, you thought that was wrong, under the bulletins? A. Yes.

Q. And you thought it was wrong because it was your position that these three companies were not manufacturing distributors? A. Yes.

Q. But, on the contrary, were dealers? A. Yes.

Q. And you didn't think the fact that they, together, owned the stock of Oakfield, which was a manufacturing distributor, entitled any company other than Oakfield to get from a licensee a manufacturing distributor's discount? A. That is it.

Q. Now isn't it true that your complaint was not that board should be delivered to Oakfield, but that board should not be sold to these three companies, the Paragon companies and the American Hardwall Plaster, at a manufacturing distributor's discount? A. We felt originally that the Oakfield Gypsum Company should only be sold at Oakfield.

Q. And you thought that some of your competing licensees were selling these three owning companies at a discount? A. Yes.

4614 Q. And you thought that was a violation on the part of the licensees? A. Yes.

Q. Will you look at Exhibit 481, please, Mr. Lenci?

(Government's Exhibit 481 handed to witness.)

By Mr. Bromley:

Q. When you used the phrase "It was decided", in the first paragraph, you didn't mean that it was decided by the persons there present that in the future they would do business only upon the usual terms of the gypsum business so far as cash discount was concerned, did you? A. No.

Q. You did mean, didn't you, that that is what Mr. Henning said the licensor would impose as one of the terms upon which you should sell, and the price which you should charge for the patented product? A. That is correct.

Q. Will you look at Exhibits 483, 484 and 485, please, Mr. Lenci?

(Government's Exhibits Nos. 483, 484 and 485 handed to witness.)

By Mr. Bromley:

Q. In exhibit 484, you wrote a complaint to Board Survey with respect to the Eastern Builders Supply Company situation in Richmond, didn't you? A. Yes.

4615 Q. Now against whom was that complaint? A. The Universal Gypsum & Lime Company.

Q. And when you said, in the last paragraph, "We have every reason to believe that Mr. Smith is still working on a commission basis contrary to the License Agreement", what did you mean? A. That he was getting a jobber's commission.

Q. From whom? A. From Universal.

Justice Stephens: Do you mean a jobber's commission?

The Witness: Well, he was called a jobber. He really comes under the broker classification, but it is the same thing, practically.

By Mr. Bromley:

Q. When you say Jim Smith was getting a jobber's commission, you mean that his company, the Eastern Builders Supply Company, was receiving from the Universal Company a jobber's discount on sales by Universal to Eastern Builders Supply, don't you? A. That is right.

Q. And at the time you wrote this letter, that is, in March, 1933, the bulletins provided that Universal should charge, in its sales to jobbers, the dealer's price, and should not give any discount to jobbers? A. That

4616 is right.

Q. And wasn't that the nature of your complaint against the Universal Company? A. Yes.

Q. Wasn't it a simple instance, again, of where you thought that Universal was selling to Eastern Builders at a price less than the dealer's price; whereas, the bulletin provided that in sales even to jobbers, they should be charged the dealer's price without a discount? A. That is right.

Q. I believe you told us a little while ago that as a matter of fact, the Eastern Builders Supply Company was not a jobber at all, at any time? A. They were not a jobber in the sense that they had a yard or a warehouse, so far as I know.

Mr. Bromley: May the witness be shown Exhibits 489 to 501, inclusive?

(Government's Exhibits 489 to 501, inclusive, handed to witness.)

By Mr. Bromley:

Q. All of this correspondence has to do, hasn't it, Mr. Lenci, with the charge that your company was guilty of rebating on board prices through the indirect method of selling plaster along with board, and charging for the plaster an abnormally low price? A. That is their com-
4617 plaint in connection with Exhibits 489 to 493.

Justice Stephens: What do you mean by "their complaint"?

The Witness: The licensor is complaining that we sold —well, the first claim is that we gave away plaster in order to influence the sale of board.

Exhibits 494 to 496 cover the Waltham Lime Company. That is a complaint from the Board Survey Company that we must have been selling plasterboard to that dealer below the bulletin prices, because the dealer in turn was making an unusually low delivered price to the customer.

By Mr. Bromley:

Q. Even in connection with the Waltham Company, as shown by the last paragraph of Exhibit 496, the charge also was, wasn't it, that you were rebating on your board price by selling plaster at an abnormally low price? A. Yes, they add that to it.

Q. Now, what are the rest of the exhibits? A. Exhibits 497 to 499 have reference to the Liberty Coal Company.

Q. And is that complaint also to the effect that you were cutting the price of board by means of the device of

an abnormally low plaster price to that customer? A. Yes, it is.

4618 Q. And what are the rest of the exhibits? A. Exhibits 500 and 501 have to do with the Service Masons Supply Company.

Q. Again, the same kind of a charge, that you were rebating to them by means of the device of selling plaster at an abnormally low price? A. No, there it is a direct charge that we were making a low price on the plasterboard itself.

Q. Doesn't it also include the charge that you were selling other of your materials at abnormally low prices, and I direct your attention to the last paragraph of Exhibit 501? A. Well, that is my reply, and in there I add the statement that we were not selling other materials below our usual selling price.

Q. You stated that— A. (Interposing) I volunteered that additional information.

Q. Although that charge was not covered— A. (Interposing) I don't think it was included in their charge.

Q. Now, in connection with these Exhibits 489 to 501, Mr. Lenci, you understood that USG was not attempting to fix or control your plaster prices, didn't you? A. Yes, sir.

4619 Q. And you at all times felt perfectly free to charge for plaster any price that you saw fit, didn't you? A. Yes.

Q. And you understood that the only complaint against you was that you were attempting to cut the board price by, in effect, giving away plaster, in the sense that you charged for it an abnormally low price? A. Yes.

Q. And you understood that to mean that you were charging this particular customer, or these particular customers, for plaster, a price lower than you were currently getting from your other customers in the market? A. That is right.

Q. And that you were doing it for the purpose of giving that customer, or those customers, a rebate on the board price? A. That is the way I understood these complaints.

Q. So that you understood that you were being accused merely of using a subterfuge to accomplish a board price reduction? A. That is right.

Q. Now, will you look at Exhibits 502 and 503, please, Mr. Lenci?

(Government's Exhibits Nos. 502 and 503 handed to witness.)

4620 By Mr. Bromley:

Q. In Exhibit 502, near the end of the telegram, you will notice there appear these words: "Lee Story must be eliminated immediately as a jobber". A. Yes.

Q. Against whom did you intend that telegram to complain? A. The Kelley Plasterboard Company.

Q. And when you said that "Lee Story must be eliminated immediately as a jobber", did you not mean merely that Kelley must cease giving Lee Story a jobber's discount on its sales to Story? A. Yes.

Q. And in Exhibit 503, the Executive Secretary of the Board Survey Company made a reference to warehousing arrangements. Do you see that? A. Yes.

Q. And that is the same kind of a complaint as to which you have heretofore testified, isn't it, that a warehousing charge was merely a device to grant a rebate to the purchaser of board? A. Yes.

Q. Now will you look at Exhibits 504 to 511, please, Mr. Lenci.

(Government's Exhibits 504 to 511 handed to wit-
4621 ness.)

By Mr. Bromley:

Q. Isn't it the fact, Mr. Lenci, that all of these exhibits have to do merely with a complaint which you were making against the Kelley Company as to its prices, based upon what you had been informed Kelley's customers—in this instance the Paragon companies and the American Hardwall Company—were doing in the board market? A. Yes.

Q. And isn't it true that in Exhibit 508, in the fourth paragraph, the correct nature of your charge is spelled out in words? A. Is it the fourth paragraph or the third?

Q. The fourth, at the bottom of the page, starting out with "We have no information". A. Yes.

Q. In other words, what you were doing in your part of this correspondence was calling the licensor's attention to what the Paragon companies and the American Hardwall Company were doing in the board market in their areas, and asking Board Survey to infer from that that the Kelley Company must be selling at prices less than the bulletin prices? A. That is right.

Q. And in the third paragraph of Exhibit 508, reference is made to the price list of the American Hardwall
4622 Company, isn't it? A. Yes.

Q. And Mr. Miller, for Board Survey, took the position that that price list showed that American Hardwall, as a matter of fact, wasn't selling at prices low enough to justify an inference that their cost, that is, the amount that they paid Kelley, must necessarily have been less than the bulletin price? A. That is correct.

Q. These exhibits, 504 to 511, inclusive, Mr. Lenci, are merely an illustration of what you testified to this morning,—that in most instances, the evidence on which you relied, in your complaint against the licensee, you had to find in the activities of the customers of that licensee, isn't that so? A. That is correct, yes.

Q. And in the third paragraph of Exhibit 504, Mr. Lenci, I notice that you again state:

"At no time are we allowed to truck into Syracuse, nor the surrounding towns. At no time are we allowed to truck less than 5000 sq. ft. into certain counties. But, the dealers in the vicinity of Syracuse, Utica, and Scranton can call at these various warehouses and obtain any amount they desire."

A. That isn't my statement, that is a statement made
4623 by our salesman.

Q. Oh, yes, in a letter to you. A. Yes.

Q. You understood Mr. Neal's reference to be merely that under the bulletins the Ebsary Gypsum Company could not truck into Syracuse or surrounding towns at the price at which companies such as Paragon were actually selling the board delivered by truck; isn't that right? A. Yes.

4624 Q. Now will you look at Exhibits 512 to 515, please?

(Thereupon, Government's Exhibits Nos. 512 to 515 were handed to the witness.)

By Mr. Bromley:

Q. Before we go to those exhibits, I neglected to ask you, with respect to Exhibit 510, if it isn't the fact that in the fifth paragraph of that letter you suggested to Board Survey that one way to give you relief on your complaint would be for the licensor, in its bulletins, to establish a price for truck deliveries in that area which would enable you to compete with such dealers as Paragon and American Hardwall? A. That is right.

Q. But as a matter of fact, no change was ever made

in the bulletins in that respect, was there? A. No, it was not.

Q. Now in Exhibits 512 to 515, can you tell us against whom you were complaining? A. The Kelley Plasterboard Company.

Q. In Exhibit 512 I notice that you do not mention the Kelley Company at all, Mr. Lenci. A. Well, I should have, but I took it for granted that they knew what I meant from the reference to the Oakleaf gypsum board whicl is made by Kelley for the Oakfield Gypsum Company.

Q. Well, just what was the transaction which
4625 resulted in the Delaware Clay Products Company jobbing Oakleaf board to dealers in western Pennsylvania—will you spell it out for me? A. The board was manufactured by the Kelley Plasterboard Company.

Q. And sold by it to whom? A. And sold by Kelley to the Oakfield Gypsum Company.

Q. At a discount? A. At a discount, yes.

Q. And what did Oakfield do with it? A. Oakfield, in turn, sold it to the Delaware Clay Products Company, of Pittsburgh, and they in turn were quoting to the dealers a price the same as though they were buying directly from one of the manufacturers. In other words, they were quoting the dealers' price to the dealer in spite of the fact that there were two other intervening parties there who must have had some commission, which would indicate to us that Kelley was giving Oakfield a much larger discount than was permitted, a much larger manufacturing distributors' discount than was permitted.

Justice Stephens: When you say that there were two other intervening parties who might have had a commission, whom do you mean?

The Witness: Oakfield Gypsum Company and the Delaware Clay Products Company. You see this is one step farther than most of the complaints.

4626 By Mr. Bromley:

Q. And that is because you found out that the Delaware Clay Products Company was offering Kelley Plasterboard Company board to dealers at the dealer price? A. That is right.

Q. Now that is the price which these dealers would have had to pay if they had bought the board directly from Kelley? A. Yes.

Q. And you didn't see how the Delaware Clay Products Company could quote that price to a dealer, in view

of the fact that the board had to pass from Kelley to Oakfield—and presumably Oakfield made some profit—and then from Oakfield to Delaware—and presumably there was a profit for Delaware—and finally Delaware could sell it at the dealer price and make a profit? A. That is right.

Q. And you inferred from that, that Kelley was violating the license bulletins, didn't you? A. Yes.

Q. Because you knew that if the license bulletins were being observed that the margin of profit to Oakfield was limited to 15 per cent of the dealer's price? A. Yes.

4627 Q. And it is the fact, is it not, that generally speaking that 15 per cent margin would be used up by a manufacturing distributor in paying its proportion of its overhead and in handling charges on the board which it bought at that discount? A. Yes.

Q. It is the fact, isn't it, that this discount of 15 per cent and 12-1/2 per cent was given by licensees to these manufacturing distributors not to enable the manufacturing distributors to make a profit, but to enable them to avail themselves of the accommodation of being able to offer the board in mixed carloads to their dealer customers? A. That was the basic reason for the manufacturing distributors' discount.

Q. It never was designed to permit the manufacturing distributors to make a profit, was it? A. No, it was designed to give them board which they could ship to their customers along with their other products.

Q. And that margin of 15 per cent and 12-1/2 per cent would be used up just in the expense to the manufacturing distributor involved in the handling, the loading and unloading, and warehousing of the board, wouldn't it? A. In that and the selling expense, overhead and all the rest.

4628 Justice Stephens: The Court will take the afternoon adjournment at this time.

Mr. Bromley: Before we adjourn, may we have permission to file, tomorrow morning, an affidavit in connection with Mr. Johnston's motion? We find in the answering affidavit something which we think affects our position, and we would like permission in the morning to file a short affidavit of our position in the matter.

Justice Stephens: You may do so.

(Thereupon, at 4:00 o'clock p.m., an adjournment was taken until Friday, February 25, 1944, at 10:00 o'clock a.m.)

4629 IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA,

Plaintiff,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS,

Defendants.

Seventh Floor,
Washington, D. C.,
Internal Revenue Building,
Friday, February 25, 1944.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

APPEARANCES:

(Same as heretofore noted.)

4634 You may proceed. Will you take the stand, Mr. Lenci?

Thereupon, GEORGE N. LENCI the witness on the stand at the time of adjournment, resumed his testimony as follows:

Cross Examination (resumed).

Mr. Bromley: May the witness be shown a copy of the minutes for the morning session of February 24?

(Copy of transcript handed to the witness.)

By Mr. Bromley:

Q. Will you turn, Mr. Lenci, please, to page 4797, and read to yourself the question and answer beginning at line 11 and running down to line 18? A. Yes, I have read it.

Q. You will notice in the question I used the words "cost you more than $15". A. Yes.

Q. Will you please explain your affirmative answer with especial reference to my use of the word "cost"? A. Well, what I thought you meant there was that it would cost us more to make the delivery to the Bronx than it would to downtown New York, the expense of delivery would be greater.

Q. And so, if you charged the dealer in the Bronx $15, that might be a price so low as not to yield you any
4635 profit? A. Yes.

Q. Therefore, if you made a truck delivery to a dealer in Bronx County, under the assumption in my question, normally the price to that dealer would be more than as though you sold a dealer by truck in New York County; is that right? A. Yes.

Q. Now, the cost of the trucking service to the manufacturer, of course, becomes greater, the longer the distance from the manufacturer's point of loading the truck to the point of destination at the dealer's warehouse? A. That is correct.

Q. So that if a price of $15 was fixed by the bulletins for a truck delivery within New York County, and that price was limited to a delivery in New York County, and if you delivered by truck into Westchester, you would feel that you should receive more than $15, wouldn't you? A. Yes.

Q. And if you delivered up into Bridgeport, Connecticut, you would feel that the price should be still higher? A. Yes.

Q. That would be because the cost of the trucking would be greater, the longer the haul, would it not? A. That is correct.

Q. And by the same token, the value of the service
4636 rendered to the dealer would be worth more to the dealer, the longer the haul? A. Yes.

Q. Will you turn, please, to page 4840, and will you read the answer beginning in the last line at page 4840, to yourself, please? A. Could I suggest a correction in that?

Q. Yes. A. On page 4841, line 7, the first word is "had". If that was changed to "wanted", it would clear that partially.

Justice Stephens: The witness may make that change in his answer if he indicates that that is what he meant to say.

The Witness: That is what I intended to explain.

By Mr. Bromley:

Q. Now, in line 10, still in the same sentence, you said, "and our price was not made up of a price at the mill, plus freight to destination plus trucking." When you said "our price was not made up", you meant the price fixed by USG in the bulletin was not calculated upon the basis of a mill price plus the actual freight to destination plus the actual trucking cost, did you not? A. No, that is right.

Q. You say you didn't mean that? A. Well, that is one of those questions that you can't say "Yes" or "No"
4637 to. Their price was not made up on that basis.

Q. Whose price? A. The USG's bulletin price.

Q. The USG's bulletin price was not calculated on the basis as indicated in lines 10, 11 and 12 of your answer, is that what you mean? A. That is right.

Q. How was it calculated? A. It was based upon their bulletin price at their local mill, plus what they thought would be a fair trucking charge for delivery to the destination.

Justice Stephens: By "their", do you mean USG's mill?

The Witness: Yes. Or, should it be in a territory where they had no mill, but one of the other licensees did have a mill, it would be based upon that mill.

By Mr. Bromley:

Q. You are talking about the method which you understood USG used in arriving at the dollar figure which was specified in its bulletins for truck deliveries in the areas of New York, Philadelphia, and Boston, aren't you? A. Yes.

Q. And you mean by that answer to indicate merely that in calculating that price, USG did not take the mill base price at the mill nearest destination and add to it
4638 the actual freight to destination and then add to it the actual cost of trucking from the end of the freight haul to the dealer's warehouse, but merely took the mill base price and added to it an arbitrary figure which was intended generally to cover freight, if any, and actual trucking cost? A. That is right.

Q. But which did not represent either the actual freight or the actual trucking cost? A. That is correct.

Q. When you said, in the last sentence of that answer, "We got paid what the other company which was located in that area figured was its cost at the mill, plus a trucking charge.", what did you mean by that? A. That we could charge what the other company used as the nearest mill base—

Justice Jackson: (Interposing) You mean you had to do that to meet their price?

The Witness: We had to do that in order to meet their competition.

By Mr. Bromley:

Q. You got paid what was specified by USG in the USG price bulletins, didn't you? A. Yes.

Q. And by that sentence, you meant merely that that bulletin price was fixed on the basis that you have
4639 heretofore indicated, that is, the mill price at the mill nearest to the particular destination, plus some round figure amount added to the mill base to cover generally trucking and freight, if any? A. That is correct.

Q. Now to give an example, if a USG bulletin fixed a price for truckload deliveries in Philadelphia, it would take the Philadelphia mill base price of, say, $13 a thousand for lath, and add to it some figure like $2 or $3, and make the price $15 or $16 for truck deliveries in Philadelphia, wouldn't it? A. Use the actual figures—$13 mill, plus $1.10, makes a price of $14.10, which is the bulletin delivered price for lath in the Philadelphia area.

Q. By truck? A. By truck.

Q. And, of course, if you sold in Philadelphia for delivery by truck, you got paid $14.10? A. That is correct.

Q. And you were trying to point out, weren't you, that in your instance, since your mill was not in Philadelphia but was in Oakfield, you had to pay the cost of the freight from Oakfield to Philadelphia, plus the actual trucking charge from your warehouse in Philadelphia, or the end of the freight line in Philadelphia, to the dealer's
4640 warehouse? A. That is right.

Q. And in that instance, the total of the freight which you had to pay, plus the total of the actual trucking charge, would exceed this differential of $1.10 a thousand which the bulletins provided should be added to the $13 price to make the delivered truck price? A. That is correct. You said "from Oakfield to Philadelphia". We would figure the freight from Wheatland to Philadelphia, which in this case happens to be the same.

Q. Yes, I should have said wheatland, because I realize that that is where your mill was located, and not Oakfield.

Now what you have said, Mr. Lenci, with respect to these answers concerning your previous testimony at pages 4797 and 4841, is all based on your understanding of the way USG determined the price, isn't it? A. Yes.

Q. And you did not mean to intimate that you had any part in calculating or determining either the amount of the price or how it was arrived at? A. No, we had nothing whatever to do with that.

Q. USG did that by itself? A. That is right.

Mr. Bromley: May the witness be shown the
4641 minutes of the afternoon session, please?

(Copy of transcript handed to the witness.)

By Mr. Bromley:

Q. Will you turn to page 4863, Mr. Lenci? A. Yes, I have it.

Q. Read to yourself, please, the question and answer from lines 14 to 19. A. Yes.

Q. In line 18, you should have said, "That we did give discounts to jobbers?", shouldn't you? A. That should be "jobbers".

Justice Garrett: That is in the form of a question by the witness—

Justice Stephens: I suggest, Judge Garrett, that you don't change the word, because the correction will be shown by the witness' testimony. If you change the word, then the purpose of the correction won't be shown.

Mr. Bromley: It is in the form, however, of a question by the witness of counsel, Judge Garrett.

By Mr. Bromley:

Q. Now, will you look at Exhibit 516, please, Mr. Lenci?

(Government's Exhibit No. 516 was handed to the witness.)

By Mr. Bromley:

4642 Q. The word "cutstock" refers to a certain kind of gypsum lath, does it not? A. Yes.

Q. It has no application to wallboard whatsoever, has it? A. No, it is board which is cut down from wallboard which was not fit to be shipped due to, possibly, breakage around the edges, or something of that kind; and instead of throw-

ing the board away, it can be recut into smaller sizes and sold as cutstock lath or plasterboard.

Q. When it is so cut, it is cut down, isn't it, to the usual sizes in which the lath is made? A. Yes.

Q. Therefore, it would not be practicable to cut down defective pieces of lath into cutstock lath, because the sizes would be too small; is that right? A. There wouldn't be anything left.

Q. There wouldn't be anything left? A. That is right.

Q. So the phrase "cutstock" means that the manufacturer takes wallboard which is in some respects defective, and of course which is generally in a much larger size than lath, and cuts it down to the lath size? A. That is correct.

Q. And sells it as lath? A. Yes.

4643 Q. And did the bulletins generally provide for a lower price for cutstock lath than for plain, ordinary lath? A. As I recall it, they did.

Q. Because it wasn't as good a product, was it? A. No, it was more like the original open-edge board that we wanted to get away from.

Q. And subsequent to 1929, and as the years went by, was it the fact that the amount of cutstock which was produced by the manufacturers steadily dwindled? A. Yes.

Q. Why? A. In one way, we all learned how to make better board and not have this damaged material. That was the principal reason for it. As a matter of fact, speaking for ourselves, we don't have enough dunnage, hardly, to pack our cars with.

Q. You mean your production results in so little defective board that it is difficult for you to even get enough defective board to use as dunnage? A. To use as packing, yes.

Q. Then at some time subsequent to 1929, it is your understanding, isn't is, that USG no longer set a price for the sale of cutstock? A. That is correct.

4644. Q. And as a matter of fact, no cutstock was produced, due to the reasons that you have said, not only by your own company but by other companies generally? A. That is right.

Q. Will you look at Exhibits 517 and 518, please?

(Government's Exhibits Nos. 517 and 518 were handed to the witness.)

By Mr. Bromley:

Q. In Exhibit 517, you were suggesting merely, weren't you, to Mr. Henning, that it might be good business if the

licensor should announce a price change by way of reducing the price of gypsum lath? A. I think Mr. Henning made that move first.

Q. He suggested it first? A. As I recall it, he suggested at this meeting, which I did not attend, that if a lower price were made on gypsum lath, it would put the gypsum lath manufacturers in a position to better compete with wood lath.

Q. Was wood lath at this time selling at a lower price, on a comparable basis, than the price fixed for gypsum lath? A. Well, it was then, and it always is selling at a lower price than gypsum lath is selling at.

Q. It is today? A. Yes. Of course, there are other factors that have to be taken into consideration be-
4645 sides the original cost of the wood lath.

Q. What are those? A. Well, with wood lath you have got a great number of small pieces that have to be handled individually, and the cost of application is higher. With wood lath you use much more plaster to secure a finished wall than you do if you plaster over gypsum lath.

Q. Why is that? A. Because with gypsum lath you have got a solid base; whereas, with wood lath, every inch and a half you have about a half inch space between the two pieces of wood lath, and the plaster goes through each one of those joints. Then besides that, there are questions of quality and matters of that kind.

Q. And, of course, where gypsum lath is used, in a sense as soon as the lath is erected the wall is partially plastered, isn't it? A. Yes.

Q. Because the gypsum core in the gypsum lath is practically the same as the gypsum plaster which is applied to the gypsum lath? A. That is right.

Q. Now, was your suggestion, contained in Exhibit 517, of a reduction in price to $14 on a carload basis,
4646 adopted by USG, if you know? A. No, it was not.

Q. As a matter of fact, a few months later, and in March, 1937, USG sent out a bulletin which reduced the price to $13, did it not? A. That is correct.

Q. Up to March, 1937, the bulletin price had been $15, had it not? A. I believe so.

Q. So that the reduction was a $2 reduction? A. That is correct.

Q. And are you able to state as to whether or not that resulted in your selling more gypsum lath in competition with wood lath—did it have that effect? A. Well, what-

ever I say in connection with that would be purely speculative, because I believe we would have sold just as much lath at $15 as we did at $13, because conditions were changing in the market.

Q. Will you look at Exhibits 519 to 522, inclusive, please?

(Government's Exhibits Nos. 519 to 522, inclusive, were handed to the witness.)

By Mr. Bromley:

Q. All four of those letters, Mr. Lenci, had to do only with the fact that you were complaining to the li-
4647 censor that the licensee Certain-teed was cutting the price to one of its customers by giving that customer a jobbing discount, which cut price was not permitted by the USG bulletins; isn't that right? A. That is correct.

Q. And the customer of Certain-teed which you alleged received the discount was the Building Material Wholesalers, Inc., of Charlestown, Massachusetts, wasn't it? A. That is right.

Q. Now, will you look at Exhibit 540, please?

(Government's Exhibit No. 540 handed to the witness.)

By Mr. Bromley:

Q. Do I understand your testimony to be that the meeting referred to in the pencilled note on Exhibit 540 was not held for the purpose of discussing the Cardiff situation? A. No, it was not, that was purely incidental. As I recall it, when Mr. Bartlett came in we talked about other matters, and in the course of conversation I asked him if they had made any decision in Chicago yet about Cardiff.

Q. And what did Bartlett say? A. He told me that it was being considered, and he hoped soon to have a reply for us.

Q. And did either Mr. Bartlett or Mr. Spray ask
4648 you any questions concerning your request to USG for consent to sell Cardiff? A. No, I don't think they did.

Q. And you did not understand, did you, that USG had sent a lawyer down there to interview you about the situation? A. Oh, no.

Q. At page 4593 of your testimony, you said that subsequent to 1935 you sold Ebsary board to the Structural Gypsum Division of American Cyanamid—do you remember that? A. Yes.

Q. And you also said that in 1938 or 1939, Mr. Bartlett inquired of you as to whether Structural was selling board and lath to dealers at prices below the minimum prices specified in the USG bulletins for its licensees—do you remember that testimony? A. Yes.

Q. And you said further that Bartlett asked you to investigate and see whether that was correct. Do you recall that? A. Yes.

Q. Now, did you understand that Bartlett was making a complaint with respect to this matter, or not? A. I wouldn't say it was a complaint as much as it was an
4649 inquiry.

Q. But you understood, didn't you, that if the inquiry had developed the fact that Structural was regularly selling at low prices, it might be the basis for a complaint against the Ebsary Gypsum Company? A. Yes.

Q. Because at this time referred to in your testimony, 1938 or 1939, the Ebsary Company was selling Structural, wasn't it? A. That is right.

Q. You said, at page 4595, that on the telephone you asked Mr. McCormick of the Structural Company about the Structural prices, and he told you they were not selling below the board prices in effect at that time. Now, in that conversation did you tell McCormick that he must resell at the dealer price? A. No.

Q. Did you make any statement of that kind at all? A. No, I did not.

Q. Did you threaten that if he didn't sell at the dealer price you would no longer continue to sell him? A. No.

Q. Now, at this time, as at all times during which you sold the Structural Company your board, Structural was competing directly with you for the trade of the
4650 same class of customers to whom you sold board, was it not? A. They certainly were.

Q. Can you tell us whether or not, after this conversation with McCormick, you did or did not continue to sell board to Structural as you had prior thereto? A. Yes. As I said yesterday, we continued to sell the Structural Company until their business was discontinued by the American Cyanamid Company.

Q. You will remember that at page 4597, you were asked some questions and gave some answers with regard to a man named Stremble, who you said was a salesman on commission in the employ of the Structural Company? A. That is right.

Q. And you testified at that page that you complained to Mr. McCormick of the Structural Company about Mr. Stremble's practices? A. Yes.

Q. Now, what were the practices of Stremble about which you complained? A. Mr. Stremble was a salesman for the Structural Gypsum Company, and he sold principally in Brooklyn and Long Island. In that same territory we had two salesmen of our own, and we had a great number of complaints from our own men that Stremble was selling the same customers, the same dealers that our men were selling, or attempting to sell, and who were our
4651 customers whom we had previously sold, and was actually giving them cash rebates to influence them to buy our lath through the Structural Gypsum Division of American Cyanamid.

Q. And did you think that that was unfair competition on Structural's part? A. Yes.

Q. You knew that rebating of this kind had long been condemned as unfair competition in the gypsum industry, didn't you? A. Yes.

Q. Now you said, in your testimony at page 4598, that later on Mr. McCormick told you that he had discharged Mr. Stremble? A. That is correct.

Q. Did you know at that time that on one occasion prior to this, Mr. McCormick had fired Stremble because of his persistent rebating? A. I didn't know that he had discharged him before that, but I know that Mr. McCormick afterward told me that long before we made a—

Mr. Steffen: (Interposing) We object to what Mr. McCormick afterwards told him, as pure hearsay.

Mr. Bromley: I think it is important as bearing on this witness' state of mind as to the situation which led
4652 him to complain to the Structural Company about something that a Structural employee was doing.

Justice Stephens: If you can bring out, Mr. Bromley, that it was brought to his attention before he made his complaint, then I think you would be correct. But as I understood his testimony, he learned it after this was all over.

The objection is sustained to the answer given, but you may rephrase the question if you can bring out the other matter.

By Mr. Bromley:

Q. Before you talked to McCormick about Stremble, what information did you have about Stremble and his

activities? A. Well, as I said, our salesmen in that same territory where Stremble was operating, reported to us that Stremble was giving cash rebates to the dealers that we had sold and hoped to continue to sell.

Q. Now, did you know or have any information about Stremble's reputation in the trade, as to whether or not he was a rebater? A. Yes.

Q. What information did you have as to his reputation? A. Well, our men said that he was not only giving rebates on lath, gypsum lath, but also on Gypsteel plaster
4653 manufactured by the Structural Gypsum Company.

Q. And did you have any information as to whether he had ever been discharged by Structural prior to this time, on account of his rebating conduct? A. At that time, I didn't know that.

Q. Did you have any information as to whether Mr. McCormick had ever sought to discipline him in any way for rebating, prior to the time that you had your talk with Mr. McCormick? A. Not prior to that time, no.

Q. Now, in connection with your testimony that McCormick did discharge him after your conversation with McCormick, did you ask McCormick to fire him? A. No.

Q. Did you make any suggestion to McCormick of that kind, in any form? A. No, I did not.

Q. And was your talk with McCormick initiated in any sense by USG? A. Not at all.

Q. Was it initiated in any manner by any other gypsum board manufacturer? A. Not at all, no.

Q. Then it was entirely and completely your own independent act, wasn't it? A. Yes.

4654 Q. In connection with your inquiry of Mr. Bartlett to which I referred a moment ago, and to which you testified at page 4593, do you recall that I asked you whether or not you didn't understand that if Structural was selling at low prices, that might be the basis for a complaint against the Ebsary Company with relation to the Ebsary prices to Structural? A. Yes.

Q. Now, the nature of that complaint, based on that evidence of what Structural was doing, would be a charge against your company that your company cut the price to Structural, wouldn't it? A. The inference would be that we were giving Structural a larger manufacturing distributor's discount than we should have.

Q. And based upon your experience, you knew that Structural's activities might raise that inference as against your company? A. That is right.

Q. And that therefore, some other licensee might complain against your company, and that the nature of the complaint would be that your price to Structural violated the bulletin because it was a cut price? A. That is right.

4655 Q. Now at any time, Mr. Lenci, did you or your company ever have any understanding or arrangement or agreement, with anybody, to the effect that you would control or attempt to control the resale prices at which these manufacturing distributors, or any of them, sold board purchased from you? A. We did not.

Q. You testified at page 4598 and page 4599 with respect to metallized board.

At or before the time that you took your metallized board license, can you tell the Court what, if any, effect was being exerted upon the gypsum board business by the manufacturers of so-called insulation board? A. Insulation board is not a gypsum product, it is a fiber board made either from a fibered wood product or fibered sugar cane refuse, or material of that kind. It is a porous board. And they had become very active in competition with gypsum, and were pushing this board for insulating purposes. And in order for the gypsum manufacturers to meet this competition, this board with the foil face was developed as a form of insulation to try to retain some of the insulating business for ourselves which we had been losing.

Q. Well, was it the fact that you had been losing gypsum board and lath business because of the competition offered by the manufacturers of insulating board?

4656 A. Yes.

Q. This insulation board, of which you have spoken, manufactured by others and not a gypsum product, was it used as a lath or a wallboard, or how was it used? A. It was used in both ways, in both sizes. It was made both as a lath and as a wallboard.

Q. So that plaster could be applied directly to it, couldn't it? A. Yes.

Q. Now, what was responsible for its insulating qualities, just generally, if you know? A. Well, with the insulating boards, they were rather soft, porous boards, and I believe they counted on the air spaces in the board to have an insulating value.

Justice Stephens: There wasn't any foil on that board, was there?

The Witness: No.

By Mr. Bromley:

Q. Now, you understood that so far as Mr. Henning of the USG was concerned, he was very anxious for the entire industry to get into the manufacture of an insulating product in order to meet this threat from the insulation industry? A. Yes.

Q. And did you agree, and consider that the insulation board threat was a dangerous one to the gypsum
4657 board industry? A. Yes, we were feeling the competition from it.

Q. And you felt it was a matter of some importance for the gypsum board manufacturers to be able to offer a board and a lath which possessed insulating qualities, didn't you? A. Yes.

Q. Now, at the time you took the license, what can you say as to whether it was your desire to manufacture the product covered by the license? A. Well, that is what we took the license for. As I recall it, we took the license in the fall of 1935, and were making shipments in January of 1936.

Q. Did I understand you correctly that you do not recall whether you received from USG any price bulletins on this product prior to the time you actually went into production? A. I am quite sure—I have been thinking about that—I am quite sure that we did not get price bulletins until we signed our license.

Q. Now I am asking you as to whether or not you got price bulletins before you started to manufacture the product? A. I don't remember.

Q. You don't remember? A. I don't remember that.

4658 Justice Garrett: Is that limited to the metallized board?

Mr. Bromley: Yes, Your Honor, I intended to limit that to the metallized board.

The Witness: That is the way I understood your question.

By Mr. Bromley:

Q. Whatever the fact is as to whether you received metallized board bulletins before you actually got into production, or not, you understood, didn't you, that the provisions of those bulletins applied only to such board as you manufactured and sold? A. Yes.

Q. And did you have any understanding or arrangement or agreement with USG that you would observe those prices prior to the time that you got into production? A. No.

Q. What happened to the development of this metallized gypsum board, was it a success or was it not? A. It was a success, not as great as we had hoped for, but it developed into a very considerable tonnage of board, and continued right along until the war, when it became impossible, due to Government restrictions, to get any more aluminum foil.

Q. Now, did you have any understanding or ar-
4659 rangement or agreement with anybody other than USG that you would maintain any price or prices as to metallized board? A. No.

Mr. Bromley: May the witness be shown Exhibit 37?

(Government's Exhibit No. 37 handed to the witness.)

By Mr. Bromley:

Q. I call your attention, Mr. Lenci, to page 531 of that exhibit which, as I understand it, is page 2 of Board License Bulletin No. 5 of February 6, 1939.

Justice Stephens: This is Exhibit 37?

Mr. Bromley: Yes, Your Honor.

Justice Garrett: Isn't that reproduced in the complaint?

Mr. Bromley: Yes, it is at pages 95 and 96 in the complaint.

By Mr. Bromley:

Q. Now there was nothing in the bulletins, as you understood them, was there, Mr. Lenci, which had any relationship to any requirement that licensees must hire trucks from trucking companies? A. No.

Q. And the only provision about hiring trucks, as you understood these bulletins, was the provision contained in the 6th line of the last paragraph on page 531, under the heading "Rebates and Allowances", which re-
4660 ferred to an indirect price cut or rebate by means of the device of hiring customers' trucks? A. That is right.

Q. Well, now, how could the hiring by a manufacturing seller, of a customer's truck, result in a rebate? A. Well, suppose we needed a truck to make a certain delivery, and that the fair trucking charge for that particular service

would be $1.50 per ton; suppose, further, that we wished to make a rebate to that particular dealer. It would be quite easy for us to go to that dealer and say, "You pay us the full price for our board, but we will hire your truck on the basis of $3 per ton." That would be a very simple and clear way of making a rebate, and that is what this paragraph has reference to.

Justice Stephens: The Court will take the morning recess.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

4661 Justice Stephens: Proceed, gentlemen.

By Mr. Bromley:

Q. With respect to your testimony about licensee meetings, Mr. Lenci, when was the last such meeting held, if you recall? A. The last meeting was held—correct me if I am wrong—I believe Mr. Henning died in the fall of 1936, and the last meeting was held in the spring, I should say in March, of 1937, and that was the time we met Mr. Keady, who took over Mr. Henning's duties, Mr. Keady of the United States Gypsum Company.

Q. And since that time there never has been a meeting of licensees? A. That is correct.

Q. Now at any time did you ever know of any representative of any one of these manufacturing distributors to be in attendance at any of these licensee meetings? A. No, they were strictly licensee meetings, there were no visitors or outside interests of any kind; they were limited to the licensees and the licensor.

Q. And would you say that the questions and answers, and the topics discussed at these licensee meetings, were always limited to matters having to do with patented gypsum board? A. Yes.

4662 Mr. Steffen: I object to that as a conclusion. I think there is a lot of detailed evidence in the record. The question is too broad and asks for a very general conclusion.

Justice Stephens: I suppose, in a highly technical sense, that it may again raise the question which has been raised by the Government so often, that the witness is not to testify as to whether or not the board was manufactured strictly in accordance with the patent process. But it seems to the Court that the witness understands that the questions refer to board which they were purporting to

manufacture, or understood they were manufacturing, under the patents.

Technically the objection is well taken and is sustained; but you may rephrase the question, Mr. Bromley.

By Mr. Bromley:

Q. It is a fact, isn't it, that there never was any discussion about prices except as they related to gypsum board which you understood was being manufactured by the licensees and the licensor under the patents and the license agreements? A. That is right.

Q. Now at any time was there ever any agreement reached among any of the representatives in attendance at these meetings as to what would or would not be done? A. No.

Q. And what is the fact as to whether or not the
4663 prices of plaster or other unpatented gypsum products were discussed at any of these meetings? A. I don't recall that they were.

Q. And so far as you know were there ever any Board Survey complaints or investigations which had to do with the prices of plaster or other unpatented gypsum products? A. No.

Q. Except for the instance relating to the Cardiff Gypsum Company, to which you have testified, was there ever an occasion when you or anyone from your company requested from USG a consent to sell a manufacturing distributor under the provisions of your license, where such consent was refused? A. That was the only case.

Q. And is it a fact that in all other instances, all consents which you requested for permission to sell manufacturing distributors were issued to you without question? A. Yes.

Q. Were there ever any conditions, written or oral, attached to the granting of consents issued to your company by USG for permission to sell these manufacturing distributors? A. No.

Q. And did you ever have an arrangement or understanding or agreement with USG, or with anyone else, that with respect to these consents, the Ebsary Gypsum Company would police or supervise or seek to control
4664 the manufacturing distributors' resale prices or practices? A. No.

Q. Was there ever an instance in which a consent, issued by USG to Ebsary to sell a manufacturing distributor, was ever withdrawn? A. No.

Q. Was there ever a time when USG or anyone connected with it ever threatened to withdraw a consent issued to you to sell manufacturing distributors? A. No.

Q. Was any statement ever made to you by anyone connected with USG that if you did not control or seek to control the resale prices of these manufacturing distributors to whom you sold under the consents, that the consents would be withdrawn? A. No.

Mr. Bromley: That is all.

Justice Stephens: The Court has just one question to clear up its recollection.

As I remember your testimony, Mr. Lenci, it was that the license agreement was signed up on or about the 6th of June, is that correct?

The Witness: The original license agreement?

Justice Stephens: Yes.

The Witness: The 22nd of May, 1929.

4665 Justice Stephens: Oh, the 22nd of May.

The Witness: Yes.

Justice Stephens: What was the date of the meeting that you attended, at or about that time, at which, as you said, Mr. Avery outlined the terms of the license agreement?

The Witness: The original license agreement?

Justice Stephens: Yes.

The Witness: We arrived in Chicago on the 21st of May.

Justice Stephens: What was the date of the meeting at which the so-called bubble board contract advantages were discussed?

The Witness: That is what I thought you were asking about before. That was on the 23rd of May.

Justice Stephens: Of that same year?

The Witness: Yes, sir.

By Mr. Bromley:

Q. That was after the licenses covering the Utzman folded-edge patent, and other patents of that nature, were signed, wasn't it? A. Yes.

Q. Those licenses were signed by the four companies that took them at that time, either on May 22nd or prior to May 22nd? A. Ours was dated the 22nd of May, and I believe the others were about that same time. Of

4466 course I have not seen them, so I don't know.

Q. It was not until after those licenses were executed and delivered, and indeed not until the day after,

that any reference was made by Mr. Avery to the so-called foam or bubble board invention? A. That is my recollection, yes.

Q. And it was on that day, the day after, that he told you that the company had applications for this invention and that you licensees could take a license under it if you wanted to? A. That is correct.

Mr. Bromley: That is all.

Justice Stephens: Is there cross examination by counsel for other defendants?

Mr. Varian: I would like to ask a few questions, your Honor.

Justice Stephens: You may do so.

Cross examination

By Mr. Varian:

Q. Mr. Lenci, did the Ebsary Gypsum Company, or any of its officers, during any part of the period mentioned in the complaint in this action, or since, have any contract, agreement or understanding, either oral, in writing, or otherwise, with any one or more of the defendants or any of the respective officers of the defendant
4667 corporations, or with any other person, firm or corporation, to control, fix or influence the price or prices, or terms or conditions of sale, or of resale, by you or by any other person, firm or corporation, of gypsum board—other than such agreements as are specifically set forth in the original license agreements between Ebsary Gypsum Company and USG, set forth in the complaint and in evidence in this action?

Mr. Steffen: I object, your Honor, upon the ground first that it is a horrible question—

Justice Stephens: (Interposing) It is a what?

Mr. Steffen: A horrible question, in length.

Secondly, it asks for a conclusion which I think that the witness ought not to be expected to give without laying a further foundation.

Justice Stephens: What was your first objection?

Mr. Steffen: That it was a horrible question. My objection on that score is that it covers nearly all the material in the case in one question, and expects a yes or no answer, and the answer, I should think, would be of almost no weight. That is, of course, an objection that goes simply to weight and form.

The principal objection is that it calls for a legal con-

clusion and there has been no proper foundation laid for asking for a legal conclusion, if the witness could give such a conclusion, and I don't think he is qualified
4668 to give such a conclusion.

Justice Stephens: Mr. Varian, what do you say?

Mr. Varian: I think there is a proper foundation. We have gone into all of these matters that are referred to in this question. They have all been gone into by Government counsel and Mr. Bromley has, I believe, quite exhaustively specifically cross examined this witness in regard to the details.

I think it is a perfectly proper question, he is well qualified, he knows exactly what the company did, and he has been in control of the sales policies of this company for all of this period.

Mr. Steffen: Your Honor, Mr. Varian asks, if I can remember the question, if the Ebsary Company or any officer or anybody connected with the company, had any agreements, oral, written or otherwise, at any time, or at any place, with anybody, concerning anything having anything to do with the gypsum industry—and it is impossible for the witness to answer that question yes or no. He couldn't, in the nature of the case, know, for example, whether Mr. Ebsary may not have had an agreement.

The question is phrased, as I got it, "did they have?"

Mr. Varian: Mr. Lenci would know whether Mr. Ebsary had such an agreement with anybody, and the question did not include any representative of the company,
4469 it included the Ebsary Gypsum Company or any of its officers. Now there were very few officers in this small company, and while Mr. Ebsary was President, yet Mr. Lenci conducted the sales policy of this company and was familiar with everything that was going on with regard to the sales, in all the details.

Justice Stephens: We are of the view, Mr. Varian, that the question is proper except in one respect. We think that it ought to be so phrased or qualified as to indicate that you are asking for facts within the knowledge of this witness. Except for that, Mr. Steffen, we are agreed that the question is not improper, for this reason—the Government has asked the witness to go with great detail into a very large number of transactions and relationships and business items, from which the Government is asking the Court to conclude that there were such agreements and contracts and transactions as are charged here to be illegal.

Now the defendants, in cross examinaton, can only meet that, since they have to prove a negative, by asking questions which are in conclusional form in the technical sense, but are actually questions which are intended to go to, and which the Court interprets as relating to, facts. Otherwise, the defendants can do nothing except go over the same detail that you have gone over.

It is conventional upon cross examination to ask such questions.

4670 Now the Court will not take the answer to the question, or treat the answer to the question, as a legal conclusion. It understands that the question only goes to this witness' knowledge of the transactions which he may refer to as contracts, agreements or understandings, and which we understand, as judges, he is referring to in the factual sense as distinguished from the legal sense.

We are of the view that if you rephrase the question, therefore, Mr. Varian, or add to the question in some such manner as to indicate to the witness that you are only asking him to testify as to facts within his knowledge, that the question is proper.

Mr. Varian: I will ask you the question again, Mr. Lenci, in accordance with the modifying suggestion of the Presiding Justice.

By Mr. Varian:

Q. Did the Ebsary Gypsum Company, or any of its officers, to your knowledge, during any part of the period mentioned in the complaint in this action, or since, have any contract, agreement, or understanding, either oral or in writing, or otherwise, with any one or more of the defendants, or with any of their respective officers, or with any other person, firm or corporation, to control, fix or influence, the price or prices, or terms or conditions of

4671 sale, or of resale, by you or by any other person, firm or corporation, of gypsum board—other than such agreements as are specifically set forth in the original license agreements between Ebsary Gypsum Company and USG, set forth in the complaint, and which are in evidence in this case?

Mr. Steffen: I would like to raise one objection as to the form of the question. He says, "any sales by you". Could that be clarified to indicate whom he means?

Mr. Varian: "To control, fix or influence, the price or

prices or terms or conditions of sale by you or by any other person".

Mr. Steffen: I didn't understand what he meant.

Justice Stephens: You meant the Ebsary Gypsum Company?

Mr. Varian: To control Ebsary Gypsum Company's price, or the price at which they sold to other persons.

Justice Stephens: Do you know what time is referred to by the "time mentioned in this complaint"? Have you read the complaint?

The Witness: Yes.

Justice Stephens: Do you know what time it covers?

The Witness: Yes.

Justice Stephens: Very well, then you may answer the question.

The Witness: My answer to that is "no".

Mr. Steffen: I move that that answer be stricken, your Honor, as being purely a matter of defense, and
4672 improper at this time.

Justice Stephens: We think it is proper cross examination and the motion is denied.

By Mr. Varian:

Q. Now I want to ask you another question in regard to—

Justice Stephens: (Interposing) I might call your attention, Mr. Steffen,—of course you are not estopped, but dozens of such questions have been asked with respect to particular transactions in this case, without objections by the Government. They are conventional questions on cross examination of this type.

Proceed, Mr. Varian.

By Mr. Varian:

Q. Did the Ebsary Gypsum Company, or any of its officers, to your knowledge, during any part of the period mentioned in the complaint in this action, or since, have any contract, agreement or understanding, oral or in writing, or otherwise, with any one or more of the defendants, or any of their respective officers, or with any other person, firm or corporation, to control, fix or influence the price or prices, or terms or conditions of sale, or of resale, by you or by any other person, firm or corporation, of plaster, or any other miscellaneous gypsum products?

Mr. Steffen: I make the same objection as to the word "you" in that.

4673 Justice Stephens: Do you take that word to mean the Ebsary Gypsum Company?

The Witness: I do.

Mr. Steffen: And I make the same objection that it calls for a conclusion and is not proper cross examination.

Justice Stephens: The same ruling.

The Witness: My answer to that is "no".

By Mr. Varian:

Q. Except as Ebsary Gypsum Company's operations were subject to the provisions of its said several written license agreements with USG, Ebsary's prices, terms and conditions of sale of gypsum board were exclusively fixed and determined by the officers of Ebsary Gypsum Company independently and without aid, urging or suggestion of any other defendant or any other person, firm or corporation—is that correct? A. Yes.

Mr. Steffen: We have an objection—

Justice Stephens: (Interposing) You are asking that question again, I assume, subject to the condition that the witness is answering as to what he knows?

Mr. Varian: As to his knowledge, yes.

Justice Stephens: Your answer to the question is, I understand you, yes, so far as you know.

The Witness: That is right.

Mr. Knuff: That takes care of our objection.

4674 By Mr. Varian:

Q. And the same would be true with regard to the prices, terms and conditions of sale of plaster and of other miscellaneous products, is that correct? A. Yes.

Q. Mr. Lenci, is it not a fact that the interest and purpose of the Ebsary Gypsum Company in obtaining a license from USG to manufacture closed-edge board, and to be permitted to use the patented machinery to manufacture same, was exclusively due to the fact that it was necessary for Ebsary Gypsum Company to manufacture and sell closed-edge board in order for Ebsary to profitably continue in the board business? A. Yes.

Q. And was it a fact that Ebsary Gypsum Company's continuance in the gypsum board business was becoming increasingly urgent in order for you to sell your other gypsum products profitably? A. Yes.

Mr. Steffen: I object to that, your Honor. In the first place, it raises a business question concerning whether or not the company could continue in business, and it

seems to me that it would ask for a conclusion and is a manner of bringing into evidence, or attempting to bring into evidence at this time, matters which are proper as defense, but not proper as cross examination—and, also, it is immaterial.

4675 Justice Stephens: The Court thinks that that objection is not well taken. You have, for the Government, attempted to show by your questions of this witness, that his purposes, that is, the purposes of the company, were of an illegal character.

The defendants have a right to cross examine to show that they were actuated by business objectives. So far as the phrase "continue in business" is concerned, that goes to the weight of the question.

The objection is overruled. The question and answer may stand.

Mr. Steffen: If I may say just one word further. We have no objection to the cross examination going into detail, but as you may say, we have alleged that their activities are illegal and it seems to me that simply to ask the question of the witness, in effect, "Were all of your activities legal?"—is asking for a conclusion that is almost of no weight.

Justice Stephens: This question didn't go to that, this question went to what purpose they had in entering into these agreements, whether it was for business reasons or otherwise. At any rate, your record is fully protected and the Court is fully aware that you object to the questions as calling for a legal conclusion, and the Court is receiving the answers not as legal conclusions, but

4676 as factual statements.

By Mr. Varian:

Q. Mr. Lenci, was it also the fact that if Ebsary took a license from USG to manufacture closed-edge board, that Ebsary was obliged to accept such form of license as USG exacted?

Mr. Steffen: I object to that, your Honor. I don't think that the witness can testify to that. It assumes things, many things, not in evidence. It is not proper cross examination and it is immaterial.

Justice Stephens: Read the question, please.

(Thereupon, the pending question was read by the reporter.)

Justice Stephens: I am inclined to think, Mr. Varian, and I think my colleagues share my view—that that ques-

tion is probably across the line, because it seems to me that the question at least sought to ask him what his understanding was as to whether the only license which was offered was a license with these terms in it.

As to whether they were forced to take this particular license would, I suppose, be a question which the Court ought to pass on.

Mr. Varian: I will reframe my question.

Justice Stephens: The objection is sustained to this question as phrased.

4677 By Mr. Varian:

Q. You were out at Chicago with Mr. Ebsary and Judge Rippey? A. Yes.

Q. When the final negotiations for this contract were entered into? A. Yes.

Q. And one of the provisions of the original license agreement, which is also in the subsequent agreement, was a provision in regard to price control.

Isn't it a fact, Mr. Lenci, that USG insisted on having the provision for price control in this license agreement? A. Yes.

Mr. Varian: That is all. Thank you, your Honor.

Justice Stephens: Is there any cross examination by other defendants?

(No response.)

Is there redirect examination?

Mr. Steffen: We move to strike all of the witness' answers to Mr. Varian's questions except the last one.

Justice Stephens: The motion is denied.

Mr. Steffen: There will be some redirect examination, yes.

Justice Stephens: Would you prefer to take a short recess before the commencement of redirect examination?

Mr. Steffen: I would like to, your Honor.

4678 Justice Stephens: Are counsel ready at this time to present any brief arguments they may care to make on the question of the motion to vacate the notice of taking of deposition of the witness Gloyd? Might we not occupy the next few moments on that?

Mr. Johnston: We are ready.

Mr. Steffen: Yes, that is agreeable.

Justice Stephens: Now the Court will hear argument of counsel on the question of whether or not the deposition

of Mr. Gloyd should be taken, in view of his physical condition, and since you are moving to vacate the notice, Mr. Johnston, you have the opening.

Mr. Johnston: I would merely want to say to the Court that in filing the motion, with the affidavit attached, I delivered to the clerk the doctors' letters so that they might be presented to the Court.

Justice Jackson: They are made, by reference, part of your affidavit, are they not?

Mr. Johnston: That is right, and they are in the record.

Now this notice to take depositions goes to both Mr. Gloyd and to Mr. Chism. The motion is only as to Mr. Gloyd. Mr. Chism has been on call, under subpoena, since November 15, 1943.

Mr. Chism has been with Mr. Gloyd in this business since about 1920, all through the period involved in this
4679 action. Since about 1930, or 1931, he has been the sales manager and has practically run the business. Prior to that time he was assistant to Mr. McGahan, who is now dead, and then to Mr. Jacobs, who is now dead.

So that during the entire period covered by this litigation Mr. Chism was there, and familiar with the matters, and is ready to testify.

Now what I would say in argument is presented in my motion, and I think it is not necessary for me to say anything further at this time.

Justice Stephens: Do I understand that this notice of taking depositions includes both Mr. Chism and Mr. Gloyd?

Mr. Johnston: Yes, sir.

Justice Stephens: And that your motion goes only to Gloyd?

Mr. Johnston: Yes, sir. I think, if I may say this, that it would be much better for Mr. Chism to come here, much less expense.

Justice Jackson: Why shouldn't he come here?

Mr. Johnston: There is no reason that I know of why he shouldn't come here, and he is ready to come at any time.

Justice Stephens: Why do you prefer to examine Chism by deposition rather than orally? It is much more satisfactory to the Court to hear and to see witnesses, than it is to read their testimony.

4680 Mr. Steffen: I agree with that, and I so told the Court, and I think Mr. Johnston understands it, that when we first served the notice our purpose was to kill two birds with one stone, if we were going to make the trip down

there. But if our right to take the deposition is denied as to Mr. Gloyd, then there would be no purpose in going to Oklahoma.

Justice Stephens: And you might just as well bring Mr. Chism up here in that event.

Mr. Steffen: That is right.

Justice Stephens: Mr. Bromley, you filed a motion. Do you wish to be heard?

Mr. Bromley: The defendants represented by me also join in the application to vacate the notice to take Mr. Gloyd's deposition, and for this reason.

This trip is going to be a very expensive matter for my clients. It is perfectly obvious to me that if we go there to take Mr. Gloyd's deposition, and end up by taking Mr. Chism's deposition, that those of us who go are going to be away for the better part of a week or ten days. That is expensive to our clients. It is a long and expensive trip from the mere standpoint of transportation expense and living expense.

The Government seeks to do this in face of the fact that in Mr. Knuff's affidavit they say:

"The testimony has to do simply with the matters
4681 of Mr. Gloyd's business, going back to about the year 1925, and with which Mr. Gloyd has long been fully familiar. There will be nothing developed in this testimony which should result in any shock to Mr. Gloyd or which could create any pressure or excitement".

Now it does seem to me that it would impose a tremendous hardship on the defendants in this case represented by me, to ask them to bear the expense which certainly will run into several thousand dollars, of going down there to have Mr. Gloyd examined, simply on matters of his business going back to the year 1925, in face of the fact that there is no showing whatsoever that Mr. Chism, whose connection antedates 1925, cannot cover fully and completely, everything about the business of Mr. Gloyd, at least from 1925; nor is there any showing whatsoever why, if they still insist they have a right to take Mr. Gloyd's testimony, they cannot cover so simple a matter as they call it, and so obviously a routine matter as it seems to me their answering affidavit shows it to be by written interrogatories.

I see no purpose, and indeed it seems to be an unjust and unfair hardship, to impose on USG and its officers, the expense involved in counsel going down there so far, for a period of time which will be so substantial, on this

showing that all they want to do is ask Gloyd about his business. Certainly Mr. Gloyd can tell them about
4682 his business in answer to written interrogatories, if it is as simple as all that.

Justice Stephens: Now Mr. Steffen, or Mr. Knuff?

I might say, Mr. Steffen, that the Court has read all of these affidavits and all of the doctors' letters, and looked up all the words, but the only one we couldn't find in an ordinary dictionary—I didn't put my hand quickly upon a medical dictionary—Is the word "geriatrics". Could anyone tell me what that means?

Mr. Steffen: I couldn't.

I will say that they practically all come down to the proposition that Mr. Gloyd has a heart condition, and a man at his age—he is seventy-nine—might normally have some heart condition.

Justice Jackson: I thought he had a sclerotic condition which affected his brain, as well as his arterial system—from those letters. I deduced that he had a general sclerotic condition.

Mr. Steffen: I think perhaps that is a more accurate statement.

We have had before us two witnesses, Mr. George M. Brown, who is seventy-seven as I recall it, and Mr. Griswold, who was around seventy-five or seventy-six, or something of that sort. Mr. Gloyd is two or three years older, seventy-nine.

So that I think, as I look over the medical testi-
4683 mony, which your Honor has stated has been read, it is undoubtedly true that he is a man of seventy-nine; that he couldn't travel and couldn't be put under the stress of a day and a half trip coming here, and getting a hotel, and all of that—and that was our reason for asking permission to take a deposition.

I want to say, going back to the history of this thing a little bit, that we asked Mr. Johnston to have Mr. Gloyd here in December, the week I think of the 20th or the 21st. We also had Mr. Tomkins scheduled at that time, following immediately after the Certain-teed people, and Mr. Johnston and Mr. Knuff, at Mr. Johnston's request, went to your Honor's chambers and talked the matter over.

At that time the only thing that was stated was that Mr. Gloyd couldn't very well make the trip, that he was not in very good health, and that it would be hard to get hotel reservations, and train reservations, just before Christmas. So the thing was put over until January.

On January 17th the Court reconvened and at that time Mr. Johnston said, informally to us or Mr. Knuff, that Mr. Gloyd was not feeling so well, and it got worse and worse according to Mr. Johnston's statement to us.

Then it appears that Mr. Johnston got these doctors' letters in early January, and they were sent in and we were not advised of that at all until February 16th or 18th, after we had made our motion for privilege to take
4684 a deposition, more or less as an accommodation to Mr. Johnston, the idea being that we could better go down there if Mr. Gloyd was really in the condition where he couldn't travel, and we assumed that that was true.

Then Mr. Johnston got additional letters which have also been submitted with this affidavit. Those additional letters, the Dr. Fishman letters at least—and that is the principal group of letters—do not add anything substantially to what was stated in the first letter.

The letter of Dr. Langston, which I think is perhaps most entitled to credit, is simply a statement that he does have a heart or brain condition, and that he is seventy-nine years old, and that he should not be put under the stress or excitement of a trial or under grueling cross-examination. That, I think, is no doubt true. We have no way of checking that.

What we say in our affidavit is that we do not expect to put Mr. Gloyd under any grueling cross-examination.

I think you have observed the way we conduct our examinations here, and they have been very decent straight through.

We understand that if Mr. Gloyd needs to have a doctor or a physician present, that that can be arranged, and that if he can only be there for an hour or two at the office where the deposition is taken, that that would be a very
4685 slight strain.

I might say in that connection that Dr. Langston saw no reason why a deposition could not be taken. Dr. Langston is, as I have said, perhaps the leading physician of the group who have written letters for Mr. Johnston.

Now coming to the nature of the testimony that we should get, we say in our affidavit, or Mr. Knuff says in his affidavit, that all that Mr. Gloyd will be asked about will be matters of his business, running back to about 1925. That covers the period of the alleged conspiracy.

Now I don't think that Mr. Bromley is entitled to construe that to mean that it hasn't anything to do with this case.

We are asking, or would want to ask, Mr. Gloyd concerning the original signing of the license agreements in 1926, we have some correspondence on that; we would want to ask him concerning the matters of pricing; following that, we would like to ask him concerning his negotiations with Mr. Avery at any time, and with Mr. Knode at any time. We would like to ask him concerning his signing of the bubble license in 1927. We would like to ask him why he did not sign the first perforated lath license agreement and also ask him in connection with the metallized board license agreement.

In other words, when we said "matters of his business", we covered everything practically that has been developed in the testimony here. I think that the affidavit, if
4686 it did not say that specifically, should be so understood.

In the concluding paragraph of the affidavit we make the general statement that his testimony, as we see it, would be necessary to a proper presentation of the Government's case.

Now Mr. Bromley makes the suggestion that perhaps we should have written interrogatories. I have already stated that written interrogatories would be very unsatisfactory, particularly with a man of Mr. Gloyd's age. We would ask a question, and he would say that he doesn't remember, and then it will be necessary to ask a number of related questions in order that we can perhaps refresh his recollection and get to the point in question. Now that simply cannot be handled on written interrogatories to any advantage.

Now secondly, the matter of written interrogatories is of no advantage anyway. Mr. Bromley is too familiar with these procedures to make such an argument seriously.

Under Rule 31, where there is described the means of taking depositions of witnesses upon written interrogatories, you have, in Rule 31 (b) this statement:

"A copy of the notice and copies of all interrogatories served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 30 (c), (e), and (f), to take the testimony of the witness in response to the interrogatories and to prepare, certify, and file or
4687 mail the deposition, attaching thereto a copy of the notice and the interrogatories received by him".

That contemplates that the witness will be brought before an officer who will propound questions, and we don't know

how, to the witness. The witness will then have to answer yes, no, or otherwise, and those answers will be written down. The whole procedure is a much more onerous procedure than what we propose, which is for ourselves to go down and simply ask our questions, and to allow the defendants to ask such questions on cross-examination as they think necessary.

Now as respects Mr. Chism, as I stated to begin with, it is a matter of no moment to us whether we take Mr. Chism's deposition at this time or not. We would prefer to have him here. We thought it might be more convenient, if we were to take one at Oklahoma City, to take both. But if Mr. Bromley would prefer to have Mr. Chism here, we would likewise, and in that event the examination of Mr. Gloyd would not take more than one day.

Justice Stephens: Mr. Johnston, do you wish to reply?

Mr. Johnston: Yes, sir. I merely want to say this, if the Court please. Mr. Steffen knows very well that in December, when he spoke to me about having Mr. Gloyd here, that I said that he had been ill and I thought it would be very unwise to try to bring him up here just at the last of that session because, with many witnesses ahead
4688 it would appear that they wouldn't get through with him anyway.

Now at that time I knew Mr. Gloyd had had a stroke in August, in California, and I told Mr. Steffen about that. I knew also that he had had a slight stroke coming back from New York in October, and I told him about that. Then when I went home during the Christmas holidays I talked to Dr. Fishman about his situation, and he told me that he didn't think that he was in any condition to testify.

Then I asked that Dr. Fishman examine him and also have Dr. Langston examine him as to his heart, Dr. Langston being a heart specialist, and that he also write the doctor in California. Then these letters came to me after I got back here.

Nothing further was said by counsel for the Government about bringing him up here. Consequently I was waiting until the question was raised again. Then, when they spoke about his coming, or about taking his deposition there, I took it up with my office and they then went to Dr. Fishman, and, so he would not be relying upon his own judgment, he referred him to these other two doctors, who are two of the highest-standing physicians in that section of the country, Dr. Riely and Dr. vonWedel. That accounts for the subsequent examination and report here on the 18th.

Now these are all men of the highest standing in the profession. They have all known Mr. Gloyd for
4689 many years, and I don't think you could find doctors anywhere that could give this Court a more correct picture of his condition and the danger of submitting him to examination, than these doctors have given this Court.

When you reduce this to language that a layman can understand—I looked up the terms also—it means this. Dr. Fishman, Dr. Riely and Dr. vonWedel specifically state that to put him under any emotional strain such as an examination, might very definitely result in a stroke that would kill him. When men have had one or two strokes, as he has had, with a sclerotic condition, at his age, nearly eighty years of age, and a heart condition which they say he has, any emotional disturbance might bring that about, particularly when a man who is eighty years of age goes on the witness stand, under examination, even with the bedside treatment that Mr. Steffen says Mr. Knuff would deliver. I have been in this case now for ninety days, and I see what kind of bedside treatment these gentlemen give witnesses.

I just appeal to this Court now to protect this old man who at best has only a few years, and I don't want to take the responsibility, in the face of what these doctors say, of having him subjected to this examination, either here in this courtroom, and traveling up here, or down in Oklahoma City by deposition.

If interrogatories can be written so that they may
4690 be submitted to him without excitement, I think with some doctor present he might be able to answer those questions. I assure the Court I want to do everything in the world to get the facts here. I have sat in this case now for these ninety days, and heard these witnesses on the stand, and the Court has heard witness after witness, when it was asked if Texas was in any of these meetings, or connected in any way with these various matters, the answer has been "no", "no", "no"—all down the line.

Now they want to drag this old man in, with failing memory, with a health condition that might be the cause of ending his life, and try to get something in this record that they don't have in here yet, and try to connect him with this case in some way. I see their purpose and I am not surprised that Mr. Steffen is insisting upon this examination, but I say to the Court that it is not fair, it is not fair to this old man, and it is within the discretion of this Court and I

just appeal to this Court not to subject this old man to that ordeal.

Justice Stephens: What do you say, Mr. Johnston, to Mr. Steffen's suggestion that under Rule 31 (b) an officer will have to go to Mr. Gloyd and ask him these questions so that he will be in a position of having been asked the questions?

Mr. Johnston: I understand that rule, but there
4691 is a difference. In that event the question is written out and I presume the District Attorney's office down there would handle it unless the Government is going to, at Government expense, send somebody down from here to do it. But the questions would be written out and the old man could take his time and could think them over, and he could determine then what he wanted to say. There wouldn't be somebody coming back with a question right at him like they do on cross-examination. At best that would be some excitement, but it wouldn't be anything like putting him under oral examination. I have not said at any time, and I do not now say, that we wouldn't attempt to have him answer questions on interrogatories. I just want to be fair about the thing, but I don't want to jeopardize this old man's life, because that is more important to him, after all, and these few years he has left, than this case.

Justice Jackson: Is there anything that Mr. Gloyd can testify to that Mr. Chism cannot?

Mr. Johnston: No.

Justice Jackson: You have talked to Mr. Chism about this case, haven't you?

Mr. Johnston: Yes, and Mr. Chism was before the grand jury in this case. All the records we have, have been before the Federal Trade Commission, have been before the Department of Justice, and they have talked to Mr.
4692 Chism both before the grand jury and in the grand jury, and Mr. Gloyd has been before the grand jury, and there isn't a thing about this case that I know of today, which Mr. Gloyd would know that Mr. Chism doesn't know.

Justice Stephens: Do you wish to be heard further, Mr. Bromley?

Mr. Bromley: No, your Honor.

Justice Stephens: Mr. Steffen?

Mr. Steffen: Our answer to the latter is that Mr. Chism does not know many of the things that Mr. Gloyd does

know. Of course we have examined his grand jury testimony and we know what the limitations are.

I don't think we should be accused of doing anything unworthy by having asked the witness to testify concerning his activities. It is true that our purpose is to get evidence that would implicate the Texas Cement Plaster Company along with the other defendants.

Justice Stephens: The Court does not construe Mr. Johnston's remarks as charging you with anything unworthy, Mr. Steffen.

Mr. Steffen: We know that Mr. Chism, at least unless he tells a different story than he did before the grand jury, is not in possession of all the facts that Mr. Gloyd is in possession of.

Justice Stephens: We will now take the noon
4693 recess until two o'clock.

(Thereupon, at 12:20 o'clock p.m., a recess was taken until 2:00 o'clock p.m., of the same day.)

4694 AFTERNOON SESSION

(The trial was resumed at 2:00 o'clock p.m., pursuant to recess.)

Justice Stephens: The Court is prepared to rule now upon the question of the taking of Mr. Gloyd's deposition.

In order to save the expense and trouble of copying into the transcript all of these papers that have been filed, the Court will try to summarize them in its ruling.

The record may show that the question is whether or not the Court shall enter an order, under Rule 30(b), that the proposed deposition of Samuel M. Gloyd shall be taken, or whether it may be taken only on written interrogatories.

There have been filed with the Court the notice of the taking of deposition; a motion by Mr. Johnston, in behalf of Mr. Gloyd, to vacate the notice of the taking of deposition, and that is supported by an affidavit which, by reference, makes a part of it the letters of several doctors,—specifically, a letter, or more particularly a report or history, dated December 30, 1943, of Dr. Fishman, C. J. Fishman; a letter of January 11, 1944, of Dr. C. J. Fishman; a letter of February 16, 1944, of Dr. Fishman; a letter of September 28, 1943, of Dr. Herbert S. Nauheim; a letter of January 11, 1944, of Dr. Herbert S. Nauheim; a letter

of February 18, 1944, of Curt von Wedel, M.D., and Harry A. Daniels, M.D.; and a letter of February 17, 1944,
4695 of Lea A. Riely, M.D.; also a letter of January 8, 1944, of Dr. Wann Langston.

There is also before the Court the opposition filed by the Government, supported by an affidavit filed by Mr. Knuff to which is appended a Federal Bureau of Investigation report.

There is also before the Court an affidavit of Bruce Bromley.

The Court has carefully examined each of these papers, and they will be filed as a part of the Clerk's files as a record of the basis of the Court's ruling.

The Court reaches the following conclusion, for the following reasons:

First, the FBI report does not seem to us in conflict in any essential particular with the reports of the doctors filed by Mr. Johnston. It is true that the FBI report does include a statement that Mr. Gloyd attends to his business several hours each day, or a statement to that effect. But that is explained by one of the doctors as a mere mechanical attendance at his office, his real business affairs being taken care of by his wife and associates.

There is a statement in the FBI report also, purporting to be the result of a conversation with Dr. Langston, to the effect that he saw no objection to taking the deposition if Mr. Gloyd were not subjected to a grueling
4696 examination. But that, we think, when read in connection with the statements of all of the doctors, indicates that he is not to be subjected to excitement.

Now the papers as a whole submitted by the doctors, and various reports, show, we think, clearly that this man has general arteriosclerosis, localized in the brain and aorta; that he has unstable blood pressure; that he has had two attacks already of either brain shock or heart shock of some sort, not exactly diagnosed by the doctors; and that his memory is confused as between present and past events, so that his testimony would be unreliable; and that in the view of the doctors, certainly the great majority of their statements, any excitement might cause his death.

It appears also that Mr. Chism, his office associate, has been connected with the business since 1925, or theretofore, and ought to be in a position at least to give some of the facts with which Mr. Gloyd might be thought to be familiar.

Now we take into consideration, of course, the promise of the Government that the examination will be conducted in a mild and proper manner, but it seems to us that it is impossible to have a man on the witness stand, whether he be in the court room or in an office, subjected to questions, in a case in which he knows he is a defendant,
4697 with several lawyers necessarily asking him questions, on direct and cross-examination, without exciting him. The mere fact of being a witness, under those circumstances, however kindly the investigation is conducted, would cause excitement.

We think, under these circumstances, the Court ought not permit this deposition to be taken except upon written interrogatories. The Court regrets the necessity of reaching such a conclusion, because it is loath to deprive any party of a witness whom the party believes to be material and important. But on the showing made here, we think it would be a grave responsibility, indeed, for the Court to order this man to be subjected to an oral examination, with the attendant possibility of his immediate death.

So the Court will order that the deposition not be taken except upon written interrogatories.

You may proceed with redirect examination.

Mr. Steffen: May we have an exception, for the sake of the record?

Justice Stephens: I think the rules give you automatic exceptions to everything, Mr. Steffen, but the record may show an exception.

Mr. Steffen: I think the record should also show that we will not press our notice for a deposition in the case of Mr. Chism.

4698 Justice Stephens: And that you will expect Mr. Chism here?

Mr. Steffen: We will bring him here in due course.

Justice Stephens: By subpoena, at some later time?

Mr. Steffen: Yes.

Justice Stephens: Very well.

Mr. Johnston: I understand, in that connection, that since Mr. Chism is the responsible head of the business, that we should have a week's notice as to the time they expect him here so we may make the necessary arrangements.

Mr. Steffen: We will be glad to give him a week's notice, as we have with all of our witnesses.

Justice Stephens: Thank you.

4699 Thereupon, GEORGE N. LENCI, the witness on the stand at the time of recess, resumed his testimony as follows:

Mr. Knuff: May it please the Court, out of an abundance of caution, and in order to keep our position clear, in so far as the record is concerned, we want to make a motion now concerning the cross-examination of Mr. Lenci by Mr. Varian.

While we are quite satisfied there is merit to our motion we are now making, we are simply making it in order to keep our record clear, and we don't intend to argue it at all.

Justice Stephens: Very well.

Mr. Knuff: We now move that all the testimony of Mr. Lenci, brought out by the cross-examination of Mr. Varian, except the answer to Mr. Varian's last question, be stricken, for the following reasons:

(1) The answers were to questions that went beyond the scope of the examination-in-chief; and therefore, the questions being improper, the answers were improper and should be stricken.

(2) The answers were to questions that were improper in that the questions assumed facts and circumstances about which the witness was not shown to have any knowledge; and therefore, since the questions were im-
4700 proper, the answers were improper and should be stricken.

(3) The answers were to questions that were improper in that the questions were directed to matters of defense, and improper at this stage of the proceedings. Therefore, since the questions were improper, and were but an attempt to introduce, by way of cross-examination, the defendants' defense in this case, the answers should be stricken.

(4) The answers were incompetent, irrelevant and immaterial.

Justice Stephens: The motion is denied.

Mr. Knuff: Mr. Steffen will conduct the redirect examination.

Redirect Examination

By Mr. Steffen:

Q. I want to take you back, Mr. Lenci, to your testimony on page 4651 of the transcript, and the pages following. That has to do with your beginning in the board business in 1928 and 1929, and your meeting, particularly, in Chicago on May 21, May 22, and May 23, 1929.

On page 4651, you testified to the effect that the open-edge board was found unsatisfactory. That is correct, is it not? A. Yes.

Q. And you said, I think, that it was wasteful to
4701 make? A. Yes.

Q. Now, wherein was the principal waste, Mr. Lenci? A. You had to make a board wider than the finished width, and every bit of that extra width had to be cut from each side of every board and thrown away. That material had no salvage value. All of the gypsum companies, at one time or another, tried to take this refuse and recalcine it, or work it back into their process, and they found that it was a dead waste and was absolutely unusable. That was one of the losses in manufacturing.

Another loss in manufacturing was that there was nothing to protect the edges of these boards, and after they were trimmed to the proper size, in handling the edges would crumble and there would be nothing to keep the plaster in between the paper from sliding out.

Q. Was it also wasteful in handling and shipping? A. That was in the manufacturing and handling. When it went into the freight cars and was unloaded at the far end, at the destination, there was still further breakage involved. And then again, when the dealer trucked it to his warehouse, he had breakage. And when he took it still further, to his customer, there was breakage and loss.

Q. And about what differential was open-edge selling at
in comparison with closed-edge, at this time, 1928
4702 and 1929, do you remember? A. I don't remember exactly, but it was quite a little under the closed-edge board price.

Q. Two or three dollars a thousand? A. Oh, yes, at least.

Q. Did you ever make an estimate, in dollars and cents, of how expensive it was to make open-edge board as compared with closed-edge board? A. I don't recall whether we did or not, as to putting it into exact figures, but we did know by observation that it was a considerable item.

Q. Was it as much, perhaps, as a dollar a thousand? A. Oh, it would be much more than that.

Q. And what was the royalty that you were charged under the May, 1929, license; do you remember? A. I would rather have the license speak for itself. I am not sure, because I don't remember the exact percentage.

Q. I believe it was a 5 percent royalty. A. I don't remember. I don't know whether that was our royalty or not.

Q. Assuming that it was a 5 percent royalty, and board was selling at, say, $13 a thousand, or lath at $13 a thousand, that would make your royalty cost about 75 cents, would it not? A. Sixty-five cents.

4703 Q. That is right, my arithmetic isn't very good. A. Yes.

Q. So that financially, the saving was such that it was very much to your advantage to take out your license and pay a royalty, was it not? A. It was, yes.

Q. Now, you also testified, I think, that you had difficulty in selling, that your dealers refused to buy open-edge board as readily as they would buy closed-edge board; is that correct? A. That is correct.

Q. And was that entirely due to the fact of the difference in the board, or were there other reasons? A. Well, it was due to differences in the board which I have mentioned so far this afternoon; and in addition, when they delivered it to the building where the ultimate consumer was going to use it, he didn't like the open-edge board any better than we did.

Q. And that was one of the reasons why the dealers were slow to buy open-edge board when they could get closed-edge board, is that right? A. Yes.

Q. And why you had to have a differential in price? A. Yes.

Q. Isn't it true also that it was difficult to sell

4704 either open or closed-edge board during this period, 1928 and 1929? Weren't market conditions, in other words, such that it was becoming more difficult to sell board at all? A. Well, we had no closed-edge board to sell, so I couldn't answer that part of your question.

Q. Well, you knew from your conversation with dealers that they were presumably buying closed-edge board? A. Oh, yes.

Q. What I am getting at is—wasn't it more difficult to sell any kind of board during this period? A. It was, to

a certain extent, because there was not a great deal of business then.

Q. That is, the construction business was falling off at this time? A. It had just begun to drop, yes.

Q. Did you also find it difficult to sell plaster during this same period? A. Yes, but not so much, because we were more established in the plaster business. We had been in the plaster business for about 10 or 11 years at that time; but here we were absolutely a new company coming in, in 1928.

Q. And what time of the year was it, did you testify, that you started your board mill? A. I think it was in the latter part of 1928.

Q. That would be along in September or October
4705 of 1928? A. Somewhere along in there, yes.

Q. And you were making an open-edge board from the very beginning? A. Yes.

Q. Now, let's go to your testimony concerning this meeting out at Chicago. Tell me how you went out—you went out by train? A. Yes.

Q. And did you go out with Mr. Ebsary and Mr. Rippey? A. I don't remember, for this reason: At that time I was in New York, as I recall it, and Mr. Ebsary was in Rochester, that is, at the plant, I should say; and I think we took trains which got us into Chicago about the same time in the morning. That is my recollection, I am not sure.

Q. And you had received a draft of the agreement, I think you testified, before you went out to Chicago? A. I believe we did.

Q. I mean, you personally had seen one? A. Yes.

Q. And you must have received that at your New York office? A. Well, you see, it might have been sent to me in New York, or it might have been sent to Mr. Ebsary at the mill.

4706 Q. But you personally saw one of the draft copies?

A. But in any event, it was turned over by either Mr. Ebsary or myself to Mr. Rippey, prior to going to Chicago.

Q. Prior to going to Chicago? A. Yes.

Q. And you were familiar with the terms of the agreement? A. Yes. The reason I say that, or what brings it to my mind, was that Mr. Rippey immediately noticed the clause in that contract providing that we should pay damages for past infringements, which, of course, was not the case.

Q. And in your opinion, you hadn't been infringing the USG patents? A. It wasn't only in our opinion, but we knew it, and so did they.

Q. And they conceded that, I take it, in the final license? A. They conceded it immediately.

Q. And the first people that you met, of the other companies, that were out there, do you remember who they were? A. No, I couldn't tell you that.

Q. Did you go out on the train with any of them, Mr. George Brown or Mr. Whittemore—did you see
4707 them before you went out? A. I did not go with any of them.

Q. You were with Mr. Reeb? A. Mr. Reeb would come from Buffalo, so I wouldn't see him.

Q. And your testimony is, apparently, that you may have gone out by yourself? A. That, I believe, is the case.

Q. Now you testified, I think, that you had all made up your mind to take out a license before you went out there; is that correct? A. That is, all in our company.

Q. That is right. A. Yes.

Q How was that agreement reached? A. Well, we had been so firmly of the idea for some time that we wanted to get permission to make a closed-edge board, that we were glad of the opportunity to be able to do it.

Q. Well, what I was getting at is—did you have a meeting with Mr. Ebsary or talk with Mr. Ebsary and Mr. Rippey concerning whether you should or shouldn't take out the license? A. Mr. Ebsary and I had discussed it a great many times before.

4708 Q. All during the preceding year? A. Yes, and probably ever since we started making board.

Q. And what was your discussion with Mr. Ebsary, generally? I would like to know. A. The gist of it was that we wanted to make a closed-edge board, but that we did not see our way to make it unless we could get a license, because we saw what had come about through the courts with the Universal and Beaver and American and Reeb. All had attempted to make closed-edge boards of one kind or another, and the courts had upheld the USG patents, and we were in no position to start a fight with those conclusions against us.

Q. And did you ever make application to USG for a license during that time? Did you discuss that? A. I don't think we did.

Q. Do you know what their attitude was on that? A. I don't recall, no.

Q. You, I think, are saying that you and Mr. Ebsary were in agreement that you wanted to get a closed-edge board, a license for a closed-edge board, or at least be permitted under some device to make a closed-edge board? A. Yes.

Q. And did you talk with anybody else in the company, was there a meeting of the Board of Directors, or
4709 anything of that sort, any action taken on the matter? A. At that time there were only three directors, and Mr. Ebsary and I usually talked things over. We had no directors' meetings at any time concerning that. We weren't as formal as that.

Q. Therefore, it was a sort of mutual agreement that you had been reaching over the course of the preceding years? A. Yes.

Q. Well, now, did you discuss the matter with anyone else than Mr. Ebsary, as to whether or not you should make a closed-edge board? A. No.

Q. Mr. Ebsary, during this time, had been talking with other manufacturers, for example Mr. Baker and Mr. Reeb and others, is that not true? A. I don't recall whether he did or not.

Q. Did you attend any meetings at all, with the representatives of any other manufacturer? A. I don't think so.

Q. You were not in that end of the business, were you? You were in the sales end? A. Principally, yes.

Q. And any negotiations that would have been had concerning the taking out of a license would have been
4710 handled by Mr. Ebsary? A. Not necessarily, we worked pretty close together on that.

Q. On page 4652, you said you had made up your mind, before you went out to Chicago, to take out a license with the USG people if it could be arranged; and I think on page 4658 you say that the other companies out there, you believe, had also made up their minds before they went out to Chicago—is that right? A. Yes, I believe they did.

Q. That is, that is your best recollection— A. (Interposing) Yes. Otherwise, they wouldn't have gone there.

Q. I think that is a good deduction.

Do you know how it was arranged that they all got out there at the same time? A. No, I don't, because it is indefinite in my own mind how we got out there.

Q. Did you see a wire sent to Mr. Ebsary stating that the other companies, with the exception of American, would come on such-and-such a date? A. I don't think so. Personally, I never saw it, and I don't think we got such a wire. I don't remember.

Q. There has been a wire introduced in evidence which was sent to several companies by the United States
4711 Gypsum Company, stating that Mr. Kling of American had stated that he was unwilling to sign the license at that time, but that if the others came out the meeting could be held in May, 1929. You don't remember having seen that? A. No. Would that possibly have been sent to Mr. Rippey?

Q. I think it was sent to Mr. Ebsary. A. It might have been.

Mr. Steffen: May the witness be shown Government's Exhibit 207?

(Government's Exhibit No. 207 was handed to the witness.)

By Mr. Steffen:

Q. Do you recall, Mr. Lenci, seeing a similar wire addressed to Mr. Ebsary or to Mr. Rippey? A. No, I don't.

Mr. Steffen: Will you stipulate, Mr. Bromley, that such a wire was sent to Ebsary?

Mr. Bromley: No, I believe the contrary to be the fact.

Mr. Steffen: We have an identical copy of that wire there, addressed to Mr. Ebsary.

Mr. Bromley: You mean in evidence?

Mr. Steffen: No, but which we received from the United States Gypsum Company's files.

4712 Mr. Bromley: I just don't know about it. I didn't suppose there was any.

Mr. Steffen: That is our understanding at the moment, that we have such a wire. We will disclose that at the proper time.

By Mr. Steffen:

Q. Now you say, though, Mr. Lenci, that you all got out there on May 21, and you didn't receive the wire or didn't receive any notice as to when the meeting was to be held? A. I imagine, if any notice was sent, it may have been sent to Mr. Ebsary, and then he would tell me about it over the telephone, and I would arrange to meet him out there.

Q. And when that notice was received, you were all prepared to go out and sign the agreement, is that right? A. We were prepared to sign an agreement.

Q. And you had a draft copy of the agreement, you knew what the general terms were? A. Yes.

Q. Now, you have been stating that you were very anxious to get into production on a closed-edge board, and on page 4654 of the transcript, in response to Mr. Bromley's question, you stated that the primary reason for the Ebsary Company taking out a license was its desire
4713 to manufacture a closed-edge type of board—is that correct? A. Yes.

Q. Now, I want, for a moment, to see whether or not that was your primary reason, and to consider certain other reasons.

Did you have other reasons also for wanting to take out a license with USG at this time? A. Well, as I say, the principal reason was that we wanted to make a closed-edge board.

Q. And what were your other reasons? A. We did hear that there would be a price control feature in the license, and that was not unattractive to us.

Q. What were the reasons why it was not unattractive? A. Well, we would be very glad to get a better price for our material.

Q. Well, your prices for material here in 1928 and 1929 were getting pretty low, were they not? A. They were low, yes.

Q. And it has been described here at various times as being a demoralized condition. Would that be a fair characterization of prices at that time? A. I don't know whether you would want to call it demoralized at that time, but it was very soft.

Q. What do you mean by that, Mr. Lenci? A.
4714 Well, I don't know how better to describe it. The volume of business was falling off, and we were suffering due to the fact that we had the open-edge board, and the other companies that were not licensees were competing for the business.

Q. And it was difficult to sell board; that is, your open-edge board, in competition with the closed-edge board, made it difficult to maintain a price? A. Yes.

Q. That, in effect, resulted in a price spiral at that time, did it not; as the price for open-edge would be cut the price for closed-edge would follow, and then open-edge would go still lower? A. Yes.

Q. And that had reached a point, in 1928, where your business was in a rather serious financial situation? A. Yes.

Q. Let me change that to 1929, particularly in 1929? A. Yes.

Q. So that it was extremely important to you, from a business standpoint, to get on the one hand a closed-edge board, and on the other hand to make sure that the price conditions were going to be corrected so that you could make a profit? A. Yes.

4715 Q. And you would say that that was another reason for wanting to take out a license with the United States Gypsum Company? A. I would say that that was a secondary reason, yes.

Q. Did you have any other reasons besides those two, Mr. Lenci, for wanting to take out a license with the United States Gypsum Company? A. Nothing that I can think of at the moment.

Q. You were not disturbed, or were you, at having USG control your prices, as to whether they would control them fairly or not? A. No.

Q. You further testified, on page 4654 of the transcript, that the license covered a large number of patents? A. Yes.

Q. Was that possibly a third reason why you wanted to take out a license? A. Yes.

Q. Now as respects those patents, did your company make any investigation of them? A. No, we did not.

Q. Did you know that perhaps 10 or more of them were all having to do with different types of closed-edge board? A. Yes, I did know that.

Q. And did your company make 10 or 12 different
4716 types of closed-edge board? A. No, but to go back a little in your questioning this afternoon, we did know that besides this one patent on closed-edge board, the Utzman patent, we believed they had other patents on closed-edge board that we might be attacked under if we started to make a closed-edge board.

Q. But you knew the Utzman patent on closed-edge board expired on August 6, 1929, within 2 months, or thereabouts, after you signed your agreement? A. Approximately, yes.

Q. And you testified, on cross-examination by Mr. Bromley, that your company was satisfied that you needed to use all, or a substantial part, of those various patents. Was that a strictly correct statement, Mr. Lenci? A. You must

realize I am not a patent lawyer, so I can't answer technically, but I realized that a great many of those patents covered different types of edges; other patents covered the method of turning the edges; and I believe certain of the other patents covered the type of machine to make the board.

Q. But you made no investigation, particularly, of the patents? A. No.

Q. And your company made none? A. No.

4717 Q. And who told you that they covered all those things? A. I think they are partially described in that schedule attached to the original license.

Q. There are about 50 of them appearing in Exhibit A, and all that appears there is the name of the inventor, the patent number, and the date, with no description of the patent. A. Well, somewhere, I don't know where it was, I saw a further description of what those patents were.

Q. Is it possible that USG advised you concerning them? A. I think maybe they did, I think maybe I asked, when I was out there, what those other patents covered.

Q. You had, of course, made up your mind to take a license before you went out there, though? A. Yes.

Q. Now, on page 4655 of the transcript, you said that you never had any knowledge of what the prices were going to be until the United States Gypsum Company announced them. Is that correct? A. That is correct.

Q. And on page 4656, you said that you very well remembered when you first received your prices out at the Chicago meeting in May, 1929? A. That was the first bulletin, yes.

4718 Q. They were handed to you in an envelope? A. I believe they were.

Q. And that was on the second day of the meeting, in the afternoon, on May 22, 1929? A. Yes, it must have been.

Q. And the whole group of licensees were present at that time? A. I don't remember whether they were all there at that time, but I would say the great majority were there.

Q. You had all signed up your license agreements by that time, and USG then handed out their prices? A. Yes, after that.

Q. Now, were you surprised when you opened the envelope and saw what the prices were? A. We were surprised, because we hadn't any idea of what they were going to be.

Q. Were they higher or lower than the prevailing prices at that time, Mr. Lenci? A. I am not sure, but it is my recollection that they were about what the USG Company was getting for their board at the time.

Q. And that was higher than you were getting for your board? A. Yes.

Q. So that were you displeased with the prices
4719 that they handed out at that time? A. I don't think I was, no.

Q. As a matter of fact, wasn't everyone there present rather well pleased with the prices? A. I couldn't speak for others, I don't know.

Q. Did anybody say that they were too low or too high or anything about it? A. The only comment I recall was that somebody made the remark that they hoped they would get $30 wallboard, that is the only remark I remember.

Q. Do you know who made that remark? A. I haven't the ghost of an idea.

Q. And $30 wallboard would have been putting wallboard back to the position where Sheetrock had been for a number of years? A. Yes.

Q. Now, as a matter of fact, Mr. Lenci, the prices of gypsum board couldn't very well go any lower and permit companies to stay in business, could they, at that time? A. It would have been very difficult.

Q. So that an honest answer would be that your expectation, and that of every other licensee there, was that they were going to be stabilized and raised? A. We were all human enough to hope that, yes.

4720 Q. And you weren't disappointed? A. No.

Q. Now, these price bulletins that were handed you there on May 22, 1929, set-up a rather full system of price control, did they not? A. Yes.

Q. They set up a series of basing points and gave you an arbitrary billing weight for your shipments, and then gave prices for different boards at different places? A. Yes.

Q. And you knew at that time, did you not, that the price control could only last until August 6, 1929? A. Yes.

Q. And did you have any expectation that this price control would all be abandoned at that time? A. I hadn't personally any idea of it, I didn't know what would happen.

Q. You mean you didn't know whether it would or not? A. We had no reason to believe that it would continue beyond August 6.

Q. And did you think that it was going to discontinue on August 6? A. We didn't know. Personally, I was not familiar enough with their patents to know whether they had other patents which would take the place of the Utzman patent or not, I did not know.

4721 Q. But the reasons which induced you to take out the license in May, 1929, would still be persuasive in August, 1929, to take out another license with price control, if that were possible? A. Well, as I go back, our primary reason for taking it was to get the closed-edge board.

Q. But your secondary reason, as you have described it, was to get a stabilized condition so that you could begin making profits again? A. Yes.

Q. And that reason would obtain in the summer of 1929 after the Utzman patent had expired, wouldn't it? A. Yes.

Q. You testified at page 4656 of the transcript, Mr. Lenci, that you had been incorrect in saying that Stephen Kelley was out at the meeting? A. Yes, I believe I was mistaken.

Q. And what caused you to decide that he wasn't there? A. I think either you or Mr. Knuff called my attention to the fact that he wasn't there.

Q. I think that that is the fact.

And you are sure, are you, that it was Mr. George Brown and not Mr. C. O. Brown that was out there at that

4722 meeting? A. Yes, I think that is correct.

Q. And how did you reach that conclusion? A. Well, you refreshed my memory in connection with that, and on thinking it over myself, I know that to be the case.

Q. You said, on page 4657, that "I have seen that in the record since. I believe it was George Brown who was there at that meeting."

By the "record", you meant something we had shown you? A. Yes.

Q. Now, let's go to the first day when you arrived out there, Mr. Lenci. This was at the Palmer House, the meeting? A. Yes.

Q. And you have testified as to who was present? A. Yes.

Q. And at the first meeting there, on May 21, 1929, you said that Mr. Avery, and I believe also that Mr. MacLeish, spoke to the group that was present? A. Either one or the other spoke to us very briefly.

Q. Might it have been that Mr. Avery spoke to you when you first arrived, and that Mr. MacLeish talked with you

and Mr. Rippey at the side meetings that you speak of? A. It might have been that.

Q. Is your recollection unclear now as to whether
4723 Mr. Avery spoke to you at that first meeting? A. The only clear recollection I have of Mr. Avery is a personal conversation I had with Mr. Avery in the room, but not in the way of a speech.

Q. What did he say, Mr. Lenci? A. He and I were sitting sort of in the corner of the room, and that is the time, as I recall it, that he spoke about the General Electric patent.

Q. What did he say? A. Not very much. He said that that Supreme Court decision had been made, and that it was his understanding that that would permit them to issue a license such as they were offering.

Q. Did you talk over the price conditions at that time with him, or was he quite familiar with them? A. No, the conference broke up very suddenly.

Q. Well, in speaking of the General Electric case, Mr. Bromley told us, at page 838 of the transcript, that the General Electric case had come down in 1926, and that that was the very year when they made their first license and put the very first price fixing into effect. That, by the way, he said was why they did it, because the General Electric case came down at that time.

You understood, did you, that the right to fix prices was based on the General Electric case? A. Yes.

4724 Q. And your understanding was that it was perfectly legal for all of the licensees to meet there and take out a license under which the United States Gypsum Company could fix the prices, as was done? A. Yes.

Q. Did your attorney, Judge Rippey, advise you to that effect? A. Yes.

Mr. Steffen: Would Your Honors care to take the 3 o'clock recess at this time?

Justice Stephens: Yes, we will do so.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

4725 Justice Stephens: Proceed, gentlemen.

Mr. Steffen: Your Honor, I would like to say at this time that it is not going to be possible to finish the redirect examination of Mr. Lenci in less than a day, and

therefore he will have to come back at the end of the recess.

I wonder if your Honors would indulge me by fifteen minutes at the end of this hour, that is, adjourn at quarter of four.

Justice Stephens: We will do that.

Justice Jackson: You have to catch your usual train, do you?

Mr. Steffen: Yes, I catch the four-ten train.

Justice Jackson: That won't give you much of a margin.

Mr. Steffen: That is right, your Honor.

Mr. Varian: May I say a word, your Honor?

Justice Stephens: Yes.

Mr. Varian: Do I understand that it is proposed to adjourn today and have Mr. Lenci back here on March 20th?

Justice Stephens: Yes.

Mr. Varian: Well, it seems that that is quite unfair to Mr. Lenci, bearing in mind what the facts are here.

He has been under subpoena at all times since November 15th. He was told to come down here on November 15th, and then they told him that he needn't be here on the 15th or 16th, but that he was to be here positively on the 17th day of November.

4726 He came down here and spent all of that week. Then he was temporarily excused, but held on twenty-four hours' notice until the Court adjourned in the early part of December.

Then on the 11th of January, before Court reconvened, I telephoned to Mr. Knuff and asked him whether he was going to need Mr. Lenci on the 17th of January, and after discussing the matter with Mr. Steffen he told me that he wouldn't need him on the 17th or 18th of January, but that he must be ready to come down here on the 19th. Ever since that time he was held on twenty-four hours' notice.

Now he has been down here two solid weeks, and his business is being very much interfered with, and if this goes over he cannot make the necessary trips around the country that he is supposed to make.

It seems to me that it is a very unfair imposition upon this witness.

Justice Stephens: Well, the Court regrets it, Mr. Varian. What treatment, fair or unfair, may have been accorded Mr. Lenci prior to the time he got on the witness stand in the courtroom here, we know nothing of, we have no control

over that, it not having been brought to our attention in any manner.

We cannot sit tomorrow, it is impossible for the members of this Court to do that. I have a war job myself, which I have some obligations towards, which may take me some time tomorrow, although it may not. But we all of
4727 us have other obligations and engagements. The Court never sits upon Saturdays because there are other things that have to be attended to of an administrative character.

Counsel for the Government have a right to conduct redirect examination. The cross-examination has extended for a couple of days. I don't see how we can refuse to ask Mr. Lenci to come back for whatever time is necessary to complete the redirect examination, and any recross examination which you or Mr. Bromley may wish to indulge in.

Mr. Varian: Well, the only thing is that his business is being interfered with, and this is a small company and they are trying to do some business. He is the principal man there who is active in the business.

Justice Stephens: We are fully aware of that, and we are aware of the inconvenience and difficulty it is to all busy businessmen, especially at this time. But the Court has to get at the facts, and can only get at them through the witnesses.

Mr. Varian: Well, so that he might not be detained too long here after the 20th of March, I would suggest that we proceed as far as we can this evening, so as not to unduly take him away from his business after March 20th.

Justice Stephens: I am sorry, Mr. Varian, but we cannot agree to that. We do not wish to be arbitrary or unfair, but the Court has its regular time of adjournment
4728 because there are other duties we have to perform. Also counsel have their various engagements which they have made.

Q. How long do you think you need on redirect examination, Mr. Steffen?

Mr. Steffen: About a day, your Honor.

Justice Stephens: Well, that being true, it wouldn't save any particular time if you have us sit for another half-hour this afternoon, as Mr. Lenci would have to come back anyway.

Mr. Steffen: And Mr. Bromley may have further examination.

Mr. Varian: We want to save every bit of time we can so that Mr. Lenci can get back to his business.

Justice Stephens: Well, I quite agree with that, but my experience, Mr. Varian, is that we don't save any time in the long run by breaking away from the usual court hours. The court hours which we sit, from ten to four, are by no means the hours the judges put in, and are by no means the hours the lawyers put in. There is a great deal of outside preparation and I think we had better adhere to our schedule.

I am sorry, but I think there is no other alternative.

Mr. Varian: We are simply continuing until four o'clock today, is that right?

Justice Stephens: Until three-forty five.

Mr. Steffen: I want to say from our standpoint that we certainly apologize for any inconvenience we have
4729 caused Mr. Lenci, and I think he has had a legitimate complaint on one or two occasions.

On the other hand, we have been trying to be very decent with Mr. Lenci and not to call him down here but to have him on twenty-four hours' notice, as we say, so that he could go about his affairs and not be any more inconvenienced than was necessary. But it has been an inconvenience and we are sorry.

Justice Stephens: Thank you for that statement.

By Mr. Steffen:

Q. Now Mr. Lenci, I notice in your testimony that there is some confusion about this first meeting out in Chicago as to whether Mr. MacLeish or Mr. Avery, or both, or neither, addressed the meeting when you all first assembled. Have you had any opportunity to refresh your recollection on that, or to consider that more carefully? A. I have given a good deal of thought to it since I have been down here, and I cannot recall anything in the nature of a formal address, or an informal address to the group.

Q. I believe that there appears in your testimony a statement that at some time there was a discussion of the patent infringement suits, of the demoralized price conditions, the General Electric case, and the possibility of price
4730 control—and it was my understanding that you had said that that was either by Mr. MacLeish or Mr. Avery at the opening of the meeting.

Could your recollection be refreshed upon that? A. From some source other than my own testimony?

Q. Do you recall having testified before the grand jury upon that point? A. I have forgotten now what it was. But my recollection is, as I said a little while ago, that I think most of this information was given to me by Mr. Avery when I was talking to him in that short meeting I had with him.

Q. Might I show you your grand jury testimony and see if that will refresh your recollection? A. Yes, surely.

Q. Your memory in 1940, that date being closer to the event, may have been a little better than it is today? A. I would be glad to see it.

Q. I therefore want to show you your testimony beginning at page 92, at the point marked with an "X", and continuing over to page 94, at the point marked with an "X"—and I will ask you to read that.

(Thereupon, the grand jury minutes referred to were handed to the witness and thereafter to defendants' counsel and thereafter to the Court, for examination.)

By Mr. Steffen:

4731 Q. Have you examined your grand jury testimony, Mr. Lenci? A. Yes, I have.

Q. Does that refresh your recollection on the matter of whether Mr. MacLeish or Mr. Avery, one or the other of them— A. (Interposing) I wish I could say that it did, but I honestly can't separate that in my mind so that I could say that it was or was not that way.

Q. Can you say there was a discussion, though, at the time when everyone gathered together there on the morning of the 21st? A. Well, I am not so sure that there was a discussion, or whether Mr. Avery simply greeted us all and—I am trying to reconstruct it—I know we broke up very promptly because Mr. Rippey and Mr. MacLeish started right that morning to rewrite our contract, and the trains from New York don't get into Chicago until about ten o'clock, and probably by the time we got our rooms there it must have been eleven, so we would have had very little time for that, and it broke up right that same morning to get to work on the contract.

Q. It couldn't have been more than a five-minute talk, could it? A. It must have been a very short time.

Q. Can you say whether either Mr. MacLeish or Mr. Avery spoke of the patent infringement suits; the demora-

lized price conditions, and such other matters? A. I
4732 would say that there probably was some mention of that, yes.

Q. In the welcome that you received? A. I don't know whether it was in the welcome, or in the individual discussion. I cannot separate it in my mind, honestly.

Q. Let us go, then, to the morning of May 23d. You testified, I believe on page 4670, that there was a general get-together on the morning of the 23d, and that it was at that time that Mr. Avery spoke about the bubble patent. A. That is correct.

Q. And you said also that that was the first time that you had heard at all about the bubble patent? A. Yes.

Q. Now see if you can recall in a little more detail what Mr. Avery said about the bubble patent. Did he state whether or not the patent had been issued? A. No, he definitely said it had not been issued.

Q. He said it had not been issued? A. Yes.

Q. Did he say that it covered a process of making board? A. As I recall it, the way he explained it was this, that he had recently made this trip to Europe, and during that time
4733 he had come across what was known as the Bayer process; that Bayer had filed an application for a patent in the United States; and that Mr. Avery had secured from Mr. Bayer the right to use Bayer's patent, which might be granted on the basis of that application, in so far as it applied to gypsum; and he further explained that his process also could apply to cement, and if I am not mistaken he said that someone in Pittsburgh had taken over the cement rights to the Bayer patent, or Bayer application.

Then he explained that Mr. Roos had also filed an application for a patent for a similar process, with the Patent Office, and that it was in the hands of the Patent Office as to which would be granted the patent.

Q. Did he say when Mr. Roos had filed his application? A. I don't recall whether he did or not.

Q. I think it was in 1924. Did Mr. Avery say anything concerning their manufacture, at that time, of bubble board, so-called? A. If I am not mistaken he said that they had tried it out in one of their plants to see how it worked, and that they were very well satisfied with the results.

Q. And what did he say the results were? A. Well, primarily that it made a much lighter board, and actually by

experience it lightened the board anywhere from 17 to 18 per cent.

Q. I am more interested in what Mr. Avery said. Did he say it was possible to reduce the weight 17 or 18 per cent? A. I don't think he specified the amount, but he explained to us—and we could readily see the reason for it—that it would materially reduce the weight of the board.

Q. Well, your board was weighing about how much at that time? A. Our board at that time was weighing well over 1800 pounds, 1800 or 1900 pounds per thousand square feet.

Q. And the reduction of 17 to 18 per cent would mean a sizeable reduction in weight, would it not? A. Yes, and that would not only mean a saving in handling, but it would mean a corresponding saving in the cost of freight and in the cost of trucking, all of which are on a ton basis.

Q. And did Mr. Avery say anything concerning the savings in cost of manufacture, or were there any mentioned? A. Well, indirectly, that if we used the bubble system we would not have to put in either wood fiber or sawdust, which was the custom at that time, and they were not only expensive, but the source of supply was very uncertain. Sometimes you could get all the sawdust you wanted, and sometimes you couldn't find it anywhere in the Eastern United States.

Q. Did Mr. Avery, in his explanation which you mentioned on page 4670 of your testimony, say that it would be possible to dry out the board faster, and that therefore it would save money in that respect? A. Yes, sir, that that was another advantage, it would come through the drying kilns much more quickly.

Q. And that might make a sizeable saving in the cost of manufacture? A. Yes.

Q. Did he make any mention of a possible royalty? A. I don't remember whether he spoke of the royalty or not, at that time.

Q. The royalty on the Roos patent was only one per cent, wasn't it? A. I would rather the contract spoke as to that, I don't want to quote royalties because they changed at various times, and I don't know.

Q. What royalty are you paying now? A. I believe it is only one per cent.

Q. And the patent that it is being paid on is the Roos foam patent, is it not? A. Yes.

Q. One per cent of $13 would be 13 cents, wouldn't it? A. Yes.

Q. And at a mill base price of $13 for lath, your royalty on that would be one per cent? A. That is correct.

Q. Your royalty is payable on the mill base, is it
4736 not? A. Yes.

Q. And not on the delivered price? A. No.

Q. So that what Mr. Avery was offering you, or what he explained to you, was a patent which might make a very considerable saving in your cost of manufacturing, and which would cost you, for royalty, about 13 cents on a $13 board? A. That is right.

Q. Now did Mr. Avery say anything concerning why he was offering this to the industry? A. I don't remember that he did.

Q. If he had retained the patent it would have meant a very distinct competitive advantage, would it not, for USG? A. Yes, it would have.

Q. Isn't it a fact that Mr. Avery was as much interested in letting the industry have it under a price control basis, as the licensees were to receive it? A. I don't know what his reason was.

Q. Would you say that it was to their advantage, as it was to your advantage to have a stabilized market where they could specify the prices? A. Yes, it would be.

Q. At page 4670 of the transcript, Mr. Bromley asked you this question:

"Q. And to make that specific, were you a party to
4737 or did you know of any agreement or understanding to the effect that the licensees would discontinue the manufacture of open-edge board and no longer make it?"

That is a broad question. Then you said, in effect, that there was no such agreement. A. That is right.

Q. That is correct, is it? A. Yes.

Q. Now you did subsequently, though, and very shortly thereafter, as soon as you could get your machinery in place, abandon the making of the open-edge board, did you not? A. That is right.

Q. And was that not true of all of the other manufacturers who were out there? A. Oh, yes.

Q. That is, open-edge board went off the market? A. Yes.

Q. Were you familiar with the license agreement which you signed—which I believe is Government's Exhibit 11—in which there is a provision to the effect that it is the pur-

pose of the licensee to abandon the manufacture of open-edge board? A. Well, I have read that agreement a great many times, but not very recently.

Q. I will show you the third "whereas" clause in
4738 your contract of May 22nd, 1929, with the United States Gypsum Company, which appears on page 48 of the complaint.

(Thereupon, a copy of the complaint was handed to the witness.)

The Witness: Yes, I notice that.

By Mr. Steffen:

Q. How did you understand that, Mr. Lenci, that you were going to discontinue the making of open-edge board? A. Well, yes.

Q. And that was the understanding of everybody that took out a license, was it not? A. I imagine so because as far as I know the licenses were all similar.

Q. And it is true, is it not, that under the terms of your agreement, as you understood them, royalty was payable on either open-edge or closed-edge board at the same rate? A. I am not sure about that first agreement. I would rather check with the agreement.

Q. I think it can be agreed that royalty was payable on any board manufactured, whether closed-edge or open-edge. Then it is a fact, would you not say, Mr. Lenci, that if you had to pay a royalty on open-edge board, and it also cost more to manufacture open-edge board, that it was a business impossibility to continue making open-edge board?

A. Well, it would be, on that assumption, yes.

4739 Mr. Bromley: I think the Court's attention ought to be called to the fact that on page 48 of the complaint, bearing a recital of the license contract to which counsel has called the witness' attention, in the third paragraph it states:

"Whereas, Licensor has been unwilling to grant a license except upon the express condition that Licensee will manufacture plaster board or gypsum wallboard only with a folded or protected edge similar to that manufactured by Licensor", and so forth, and that in the very next paragraph the recital is:

"Whereas, Licensor has agreed to waive the express condition aforesaid", and so forth.

So that the recital was only made so as to make it clear that there was no such condition—and it isn't fair to call attention to only half of it and create the opposite impression when, if both paragraphs are read, it is perfectly plain that there was no such condition.

Justice Stephens: Well, we will have to suspend at this time.

Before we adjourn, the Presiding Judge wishes to make a statement, very briefly.

I am sorry I can't refer to the exact page of the transcript, but counsel will remember that during the examination by the Government of this witness the question arose upon the objection of the defendants, to the introduction of evidence concerning the practices under the bulle-
4740 tins, specifically those referred to in paragraph 91 of the complaint. The Government offered the evidence to prove two things: First, that the license agreements were being used as a subterfuge or a cloak for illegal practices; and second, that they went beyond, or took the license agreement beyond, the proper limits of the General Electric case.

Mr. Bromley objected, saying that there was no charge in the complaint that the license agreements were themselves illegal, or that the practices under them were illegal, pointing out that in paragraph 91 there was no charge that these various bulletin provisions were unreasonable.

Judge Garrett and Judge Jackson expressed themselves at that time, through me, as of the view that the complaint did charge illegality in the license agreements, as going beyond the proper limits of the General Electric case, but I deferred an expression of my views on that subject until I could give further consideration to it, and we made a ruling that if the Court should ultimately determine that the complaint did not charge that the license agreements were illegal as going beyond the reasonable limits of the General Electric doctrine, the evidence would be considered by the Court only under the subterfuge charge, and that it could be stricken so far as it might relate to the alleged illegality charge.

Since that time I have gone through the complaint
4741 again with great pains and I have reached the conclusion, and I think I ought to announce it so that counsel will be advised, that the complaint does charge that the license agreements are illegal.

I think it could have been much more clearly charged if paragraph 91 had explicitly said that the bulletin provisions and the license provisions were not in reasonable protection of the patent monopoly. But I think in paragraph 46, Mr. Bromley, on page 11 of the complaint, in the next to the last sentence, where the Government charges:

"Said license agreements are not bona fide patent license agreements reasonably designed to secure to USG the pecuniary reward for valid patent monopolies, but were entered into and executed for the illegal purposes described in paragraphs 44 and 45 hereof." —that that is, in effect, a charge that they did go beyond the reasonable limits of the General Electric case. That, therefore, is the ruling of the Court in its construction of the complaint.

I announce that so that counsel on both sides will be advised.

I ought to say also that although I have reached that view with respect to a charge as to the illegality of the license agreement as going beyond the proper limits of the General Electric case, the fact that I reach that view leaves me in still further doubt as to what the Government means
4742 by the subterfuge charge in this case.

I have never been able to get it clear in my mind, and this decision which I have just made, or announced, as I say, makes me still less clear, as to what the Government means by its subterfuge charge.

I had been under the impression from the beginning of this case that the Government had two distinct and in a sense, separate charges: First, that the license agreements were illegal as going beyond the proper limits of the General Electric case, that is, as containing provisions and permitting practices which were not in reasonable protection or reward of patent monopolies; but second, that if they were legal on their face, they were entered into as a subterfuge or cloak.

I had supposed the Government was intending to prove under that, that they were not bona fide agreements, that they were entered into with the intention not of being agreements under the General Electric doctrine, but not of being agreements at all, but just cloaks or pretenses of agreements.

I am still at a loss to understand what the Government's theory of subterfuge is, and I think my colleagues are in the same doubt. It would clear up the case, and would help the Court a great deal in making consistent and clear rul-

ings on the admissibility of evidence, if we knew more definitely what the Government's charge is on the subterfuge theory. Perhaps you can clear that up later.

4743 Mr. Knuff: Is there any specific suggestion that your Honor would care to make, either in the form of a memorandum on it, or what not?

Justice Stephens: No. I thought perhaps it might be brought out at the next discussion on this topic.

Mr. Knuff: I would be glad to prepare a memorandum for the Court's consideration.

Justice Stephens: If you wish to do that, you may, we would be very glad to have you do that, and to have you serve copies on the defendants; but you are not required to do that and perhaps you would prefer to state it orally when we resume session. Suit yourself on that.

Justice Jackson: I don't mind telling you what my understanding of this complaint was.

It was, that the complaint charged two things: One, that the licenses were, per se, illegal; but two, even if the licenses were legal, that the things done under them made them a sham and a cloak, and made them illegal.

Mr. Knuff: I think that is correct, but I think we went just a little farther than that, and I would like to have an opportunity to consult Mr. Steffen on that. There is no doubt that we meant those two things.

Justice Stephens: But you also say in paragraph 46 that they are not bona fide license agreements, and you say that the combination was carried out in the guise of

4744 numerous license agreements purporting to relate to the use of certain patents to give color of legality to the combination, and that smacks as if all this thing was a sort of a feint or a dodge, and that there weren't any contracts really executed at all in good faith, that they just went through the pretense of executing the contracts.

That is why I was surprised, as I have frankly indicated I was, at your going into all this evidence which seemed to me to tend to prove that the parties were taking these agreements very seriously and insisting upon abiding by them.

I mention this only because it does help the Court a great deal in making clear rulings, if it knows clearly what the charges and what the defenses in the case are.

Mr. Knuff: We will try to clear that up.

Justice Stephens: Thank you.

Justice Garrett: Since Judge Jackson has spoken his view I may say that that also was my view, that is the way I construed the matter from reading the complaint. But I made some inquiries concerning that at one time here, probably during the examination of this witness, or some other, and somehow I arrived at the conclusion that the Government, as was just now said by Mr. Knuff, meant something more than that, that that was his view about it, so I quit asking questions about it. It didn't add to my information, and I had plenty of ignorance already—so I just quit asking questions about it. I thought it would work out
4745 eventually. (Laughter.)

Mr. Knuff: Had I drawn this complaint I would have been able to tell you the reason for the third comma on line 6, page 17, but I didn't draw the complaint and I didn't participate in its drawing.

Justice Stephens: Very true, we are not charging you with negligence or lack of lawyer-like action in respect of drawing the complaint, when you didn't draw it, but still the Government is under an obligation, as are the defendants with respect to their defense, to make their theory clear.

Mr. Knuff: And we want to clear it up.

Justice Stephens: The record may show, to conclude this matter, that the evidence that was received at the time of the ruling to which I referred, is now ruled by the full Court as applicable to the charge that the license agreements are themselves illegal as going beyond the proper limits of the General Electric doctrine, as well as to the charge of subterfuge. That will make the record clear.

You may announce the recess.

(Thereupon, at 3:55 o'clock p.m., an adjournment was taken until 10:00 o'clock a.m., Monday, March 20, 1944.)

4747 IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA,

Plaintiff,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS,

Defendants.

Seventh Floor,
Internal Revenue Building,
Washington, D. C.,
Monday, March 20, 1944.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

APPEARANCES:

(Same as heretofore noted.)

4763 Justice Stephens: Mr. Lenci, will you take the witness stand?

Whereupon George N. Lenci appearing as a witness herein, having been previously sworn, resumed his testimony as follows:

Justice Stephens: Mr. Finck, do you know when Mr. Adams will be here?

Mr. Finck: He will be here Wednesday, Your Honor.

Redirect Examination (resumed)

By Mr. Steffen:

Q. I want to take you back, Mr. Lenci, to the first price quotations that you gave to your salesmen, following the meeting of May 21 and May 22 and May 23, 1929.
4764 Those are Exhibits 405, 406 and 407, if you may be shown them for purposes of getting on the track again this morning.

(Exhibits 405, 406 and 407 handed to witness.)

By Mr. Steffen:

Q. I call your attention particularly, Mr. Lenci, to Exhibit 405, and the quotation of $17.50 per thousand, f.o.b. mill. That price, Mr. Lenci, was for the covered-edge board if and when you got into production, was it not? A. Yes.

Q. I think you testified concerning that on pages 4671 to 4679 of the transcript.

That price of $17.50, Mr. Lenci, was the same price as the price for No. 2 grade wallboard, was it not? A. Yes.

Q. Having a covered edge? A. Yes.

Q. Now your price of $15 per thousand square feet, f.o.b. mill, was on your open-edge board, was it not? A. Yes.

Q. Now that was your standard production, wasn't it? A. That is what we had been making up to that time.

Q. And that price is the same as the price for seconds which was put out by the United States Gypsum Company in their bulletin of May 23, 1929, Government's Exhibit 404?

A. Yes, that shows a $15 price for that item, too.
4765 Q. Now you testified at page 4679, and page 4680, that you had no understanding that the price for your board was to be—that is, your open-edge board—was to be the same as the price for seconds; is that correct? A. That is correct, yes.

Q. Prior to this time, Mr. Lenci, your open-edge board had been selling in competition, had it not, primarily with the No. 2 or seconds, particularly the seconds put out by USG and some of the other companies? A. Well, we had been trying to get business against any competition we had to meet. We were selling our board wherever we could, no matter what the opposition was.

Q. But your chief competitor was the No. 2 grade board or the seconds, let us say, which was being put out by certain of your competitors? A. To a certain extent it was.

Q. And it was a perfectly normal thing for you to have selected the $15.00, which was the price that USG fixed for its seconds, or fixed for seconds to be sold by licensees, as being the price at which you should sell, thereafter, your open-edge board? A. That was the price we would like to sell it for, because it meant a little improvement over what we had been doing.

Q. My question was that it was quite natural that
4766 you should select the same price, inasmuch as seconds were sold in competition, principally, with your open-edge board? A. It was governed by two factors: We couldn't get more than that price because they could buy that open-edge board, or the seconds, from one of the other companies at that price; and we didn't want to sell any lower than that because we were naturally anxious to get as much profit as we could.

Q. Do you recall any discussion concerning the price at which you should quote your open-edge board? A. No.

Q. Was there any mention at Chicago on May 23, 1929, as to what you should do concerning your open-edge board, to dispose of it? A. I haven't any recollection of it, no.

Q. Do you know what your competitors did with regard to their prices on open-edge board? A. Well, I think most of our competitors were not making an open-edge board. As I recall it, the only one that was making it was Certain-teed. The others were making a closed-edge board which was an infringement on the licensor's board.

Q. Was National making a closed-edge board? A. I think they were.

Q. Or a partially-closed edge? A. I think so. The American and Reeb were.

4767 Q. They were not, in 1929, were they? A. Well, they had been during quite a period before that, not of a board which they claimed was the Utzman board, but they had their own way of folding those edges which gave them, in effect, a closed-edge board.

Q. The testimony here indicates that in July, 1928, American abandoned the closed-edge or modified closed-edge board, and went to a different type of edge.

Well, you stated that this was arrived at as an independent matter on your part, Mr. Lenci, this matter of fixing a $15 price on your open-edge board; and you also stated, on page 4680, that you arrived at the matter of billing weights as an independent matter. Do you remember that? A. Yes.

Q. Now those billing weights which you selected were the same as those provided in the United States Gypsum Company bulletins, were they not? A. I believe they were. I have no present recollection of it, but my recollection is that they were, yes.

Q. And when you said that you arrived at it as an independent matter, you meant, of course, that you had to make your own decision— A. (Interposing) Yes.

Q. (Continuing) —but you were following the billing weights which were specified in the United States
4768 Gypsum Company bulletin? A. My present recollection is that our board, our 3/8 inch board, was weighing just about that amount at that time. As I recall it, our board weighed somewhere between 1800 and 1900 pounds.

Q. Prior to this time in 1929, you hadn't used an arbitrary billing weight, had you? You had used the actual weight, in making shipments? A. I think we did, I think we did.

Q. At page 4686 of the transcript, Mr. Lenci, you speak concerning the board machine which your company purchased. I think that was bought in 1928? A. Yes.

Q. And you bought it from a concern out in Kansas? A. Yes.

Q. Do you recall how much it cost? A. Why, approximately, yes. You see, a board machine is made up of two principal parts, the machine itself and the kilns. The board machine people don't furnish the kilns, the dry kilns.

Q. That has to do with making stucco, the dry kilns? A. No, the stucco kilns are an entirely different kind of a kiln. But the board is made on a machine and then it goes through the driers and is dried.

Q. By kilns, you mean the driers? A. Yes.

4769 Q. A board machine is about 100 or 150 feet long? A. Oh, no.

Q. How long? A. Our board machine in the beginning was about, I think it was 634 feet.

Q. That is including the kilns? A. No.

Q. Just the board machine alone? A. Yes.

Q. And if you take the machine alone, about how much did it cost? A. As I recall it, it was about $75,000, and that did not include—we had to set it up ourselves with our own labor. I believe they furnished all the machinery and a supervisor, or something of that kind, and we fur-

nished the labor and machinists to erect it and put it into operation.

Q. Now, you didn't wish to give the impression, from your testimony here on page 4686, that when you converted to make the closed-edge board, you had to replace that machine? A. Oh, no, we replaced certain parts of it.

Q. And those parts were at the wet end of the machine, at the head of the machine, particularly? A. At both ends; at the wet end of the machine, which you would call the head end, we put in the machinery for turning
4770 the edges. And at the far end, it was the elimination of the saws which trimmed the rough edges off of the open-edge board.

Q. So you could simply take those saws off and that would take care of that, and then at the wet end of the machine you had to put in a device which would turn the edges of the board? A. Yes.

Q. And do you recall whether that was purchased from the Ehrsam Manufacturing Company? A. I don't remember who we got that from.

Q. It was a rather minor matter? A. Yes, I don't really recall who furnished that.

Q. On page 4687, Mr. Lenci, Mr. Bromley asked you: "Did you have any understanding or agreement that if you took the license, USG would raise or stabilize prices on patented board covered by the license?"

And you answered: "No."

Do you remember that? A. That is correct.

Q. Now by "agreement", did you mean written agreement, or by "understanding", written understanding? A. No, I meant any understanding.

Q. Any understanding at all? A. Yes.

4771 Q. And by stabilizing prices on patented gypsum board, you understood, of course, that your license agreement itself would operate to stabilize prices, did you not? A. Yes.

Q. And you didn't mean to exclude that? A. No, of course not, but what I meant was that there was no prior understanding, oral or written, that certain prices would be established, and what those prices would be. We knew that the license agreement would cover the fixing of prices for the sale of patented board.

Q. And you knew that it would also result in stabilization? A. Yes.

Q. And you knew that, in the first place, because every-

body, practically, was signing the license agreement? A. Yes.

Q. And the license agreement also provided, you knew, that if any other or better license should ever be given, that each of the present licensees would be given substantially or exactly the same terms? A. I believe it was to be exactly the same terms.

Q. That is right. A. Yes.

Q. Then on the same page, Mr. Bromley asked
4772 you:

"Did you have any understanding or agreement with anyor , with respect to what price you should quote or charge for plaster?"

And you answered: "No."

Do you remember that? A. That is correct, yes.

Q. And by that you mean the same thing, that you never talked, at this May meeting for example, concerning an agreement regarding plaster prices? A. That is right.

Q. Is that right? A. That is right.

Q. You understood, of course, that you would not be permitted to sell plaster in order to influence your board prices? A. Yes.

Q. And you understood that that would, in a measure, stabilize your plaster prices, or rather, make them a little more fixed than they were before? A. It might have that effect, yes.

Q. Prior to this time, in 1927 and 1928, you were a free agent to sell your plaster any way you wanted to, and at any price? A. Well, both before and after.

4773 Q. What I am getting at is that prior to 1929, if you had cared to shade your plaster price 5 cents, for example, in order to get a contract including board, you would have been free to do that, would you not? A. Yes.

Q. After the 1929 agreement, and the bulletins concerning the board, you were not so free, were you? A. As I understood it, we were not free to give plaster away or to sell it at an extraordinarily low price to influence the sale of board. But there was nothing there that kept us from free competition in plaster, and our experience was that it was extremely free during the past 10 or 15 years.

Q. I think you testified, Mr. Lenci, that even a 5-cent reduction or a 10-cent reduction in plaster prices, or board prices, would be very influential to a prospective buyer in the building field; is that not correct? A. I don't remember of making that statement.

Q. Perhaps I am wrong on that. But that would be true, would it not? A. They wouldn't notice a 5-cent reduction in the price of plaster.

Q. What would be the first point at which they would begin to notice it? A. They usually talk 50 cents
4774 or a dollar when they talk about plaster.

Q. That is per ton, is it? A. Yes.

Q. And a 50-cent reduction in the plaster price would be a material reduction? A. It all depends on what the other companies were selling plaster for at the same time. In other words, we are competing on plaster against other plaster manufacturers. If they were all selling their plaster at, say, an arbitrary price of $10 at a certain place, we would be competing against that price, we wouldn't be competing against the board price. The plaster business is a separate business.

Q. Is that exactly true? Are not board and plaster sold together very largely? A. The wallboard is very rarely sold in connection with plaster.

Q. By "board", I mean gypsum lath as well. A. Lath may or may not be. The reason I say that is that it is the common practice in building construction to let a general contract. The general contractor then lets a sub-contract to a plastering contractor. The plastering contractor in turn sublets to a lathing contractor. Then the plastering contractor will buy his plaster through the dealer with whom he usually does business; and the lathing contractor will buy his lath through the dealer with whom he
4775 usually does business. So in a great many of the cases, especially in the larger cities and on the larger jobs, you are selling lath through one source, and plaster through another source. Do you understand?

Q. I think I understand perfectly.

To make the illustration simple, though, in the cases where you are selling to a dealer who in turn is selling both plaster and lath to a contractor, then in that case it would be very material to the dealer who was buying the supply for this entire contract to know what his prices on plaster and what his prices on board were, and if the price on plaster were shaded by, say, 50 cents, that would be a material element in determining whether or not he was going to buy board from you? A. That would be correct, yes.

Q. And prior to the agreements in 1929, you could make any adjustment that you saw fit, in your plaster prices, to influence the price of board? A. That is correct.

Q. And subsequent to that, you could not make an adjustment in the price of plaster for purposes of influencing the sale of board; isn't that correct? A. That is correct, but I don't know where you would draw that line as to how much of a cut in plaster was made in order to sell the plaster, and how much of the cut was for
4776 the purpose of influencing the board sale. I couldn't tell you where that point would be.

Q. Well, I wouldn't know, either. But the bulletin—and I refer to Government's Exhibit 37, page 923—doesn't make any distinction as to whether it is a large or a small reduction in plaster prices which might influence the sale of board? A. I know that.

Q. It simply says that whatever the reduction is, it may not be made if its purpose was for the purpose of reducing the price of board. A. That makes it a question of fact as to whether it was made for that purpose or not.

Q. I see.

Mr. Bromley: What is the date of that bulletin, please?

Mr. Steffen: That bulletin is dated February 6, 1939.

Justice Stephens: What is that exhibit number?

Mr. Knuff: Exhibit No. 37, Your Honor. In your book it will either be page 923 or 531. There are two numbers, because it has been photostated twice, and they have changed the number, and I don't know which one you have up there.

Justice Jackson: Is it reproduced in the complaint?

Mr. Knuff: I am inclined to think that that is in the complaint, Your Honor.

Mr. Steffen: Yes, it is in the complaint on page 96.

4777 Justice Stephens: I have page 531 of Exhibit 37. Was this the one on rebates and allowances?

Mr. Steffen: That is right.

Mr. Knuff: That is correct, Your Honor.

By Mr. Steffen:

Q. You also testified, Mr. Lenci, on page 4687, in reply to one of Mr. Bromley's questions, that you did not enter into or know of any agreement or understanding that jobbers would be eliminated from the distributive system. Do you remember that? A. Yes.

Q. And by that you meant what, that there was no agreement at this May meeting that you were going to then eliminate jobbers? A. Yes.

Q. And there was no provision in the license agreements which expressly provided for eliminating jobbers, was there? A. No.

Q. Nor was it provided at all for eliminating jobbers? A. No.

Q. Now, you did not wish to imply by your answer that there weren't many meetings between the licensees and USG at which jobbers were discussed? A. That there were not?

4778 Q. You didn't mean by your testimony to imply that there were no meetings between licensees and USG at which the matter of sales by jobbers was discussed? A. The question of jobbers was mentioned at several meetings, at two or three meetings anyway.

Q. You have testified concerning that, and your answer here didn't mean to change your testimony that there were several meetings at which sales by jobbers was discussed? A. No. Sales were discussed.

Q. And following those meetings, and those discussions, a bulletin was issued making the price to jobbers the same as the price to dealers? A. Yes.

Q. And the effect of that was to eliminate jobbers from the distributive system, was it not? A. More or less. As you know from the testimony which came afterwards, they were not eliminated.

Q. What do you mean by that? A. There were complaints all during this period that they still were buying at discounts from various manufacturers.

Q. That is, for a period of a year or two following the initial price bulletin? A. For a number of years, yes.

4779 Q. But they are substantially eliminated now, is that not correct? A. Yes—when you say "eliminated", I don't know just what you mean. You don't mean eliminated, you mean that they were put on the same basis as dealers?

Q. That is right. A. But there was no intention at any time to put them out of business, because they are still in business and doing a good business.

Q. Perhaps we had better go into that. By that you do not mean that they are getting a discount— A. (Interposing) No, but a jobber has gotten himself in a position where he is fulfilling a certain—not duty, but—

Justice Jackson: (Interposing) Function.

The Witness: Thank you, sir—function, in the business. He has the material in stock, and there are a lot of small

dealers who, for financial reasons, or due to the size of their warehouses, are not able to buy large quantities; and there are a great number of these jobbers who buy at the dealer price and then sell above the dealer price to these smaller dealers as a privilege to these smaller dealers, it helps them a great deal.

By Mr. Steffen:

Q. But there are no jobbers who buy at a discount from the manufacturer and sell to the dealer at dealer prices?

A. Not so far as our company is concerned.

4780 Q. And you don't know of any in the industry?

A. No, not at the present time.

Q. And in so far as that constitutes being a jobber, those jobbers are eliminated? A. Yes.

Mr. Steffen: We might take our recess at this time, if that is agreeable.

Justice Stephens: We will take a five-minute recess.

(Thereupon, a five-minute recess was taken, after which the trial was resumed.)

Justice Stephens: The trial will be resumed.

In order that counsel may be definitely informed as to the program of the Court, the Court will sit this week and next week, closing on Friday, March 31st, and will reconvene on Tuesday, April 11, rather than on Monday, April 10th.

You may proceed, Mr. Steffen.

By Mr. Steffen:

Q. With further respect to jobbers, Mr. Lenci, on page 4689, Mr. Bromley asked you if it came as a surprise to you that the price to dealers and the price to jobbers was made the same, and you made the statement: "We had no part in making that up."

By that testimony you didn't mean to say that you had not had these various meetings at which jobbers and sales by jobbers, were being discussed? A. What date

4781 does that refer to?

Q. 1930. By that you didn't mean to exclude the fact that your company, as a licensee, and other licensees, had discussed with USG the matter of sales by jobbers? A. It wasn't so much a discussion by us, as a statement by USG that certain things were going to be done.

Q. That applies to the issuance of bulletins, or as to

what they were going to do by way of fixing prices, is that what you mean? A. Yes.

Q. And those statements in the bulletins followed these licensee meetings at which you licensees asked Mr. Henning or Mr. MacLeish questions concerning bulletins and conditions in the industry, is that not right? A. Well, these bulletins didn't follow the meetings.

Q. Not always? A. No. I mean we didn't have a meeting, and talk things over, and then have it confirmed by a bulletin. I don't want to ever get that into the record.

Q. I understand that perfectly. A. These bulletins came out entirely independently of anything we did or talked about.

Q. But they had to do with the matters which you did talk about? A. Which were brought up by the licensor, yes.

4782 Q. And which, on occasion, were brought up by the licensees? A. At the moment I don't recall what that would be.

Q. Well, you made complaints concerning jobbers, and then questions came up concerning housewreckers and things of that sort at these various meetings? A. That is true.

Q. And on occasion those matters appeared later in bulletins, did they not? A. Well, I haven't read these earlier bulletins for a long time, but it seems to me that the question of jobbers was mentioned in the bulletins right from the start.

Q. The first one I think was in 1930. A. That is the year following.

Mr. Bromley: That is not true at all. The very first bulletin had a provision in it about jobbers, and set the discount.

Mr. Steffen: I think that is correct. The one I had reference to is the one that fixed the price at which you were to sell to jobbers as being the same price at which you sold to dealers.

Mr. Bromley: But that wasn't the first mention of jobbers. Jobbers were mentioned in the first bulletin that was issued.

Mr. Steffen: I agree to that, and the one I had reference to was the one issued in August, 1930, at which the

4783 price to dealers and jobbers was made the same.

The Witness: Yes, but I do not recall any discussion between the licensees and the licensor to the effect that that was going to be done.

By Mr. Steffen:

Q. I will show you, Mr. Lenci, in order to refresh your recollection—you say you do not recall—your testimony before the grand jury, beginning at the point marked "X" on page 251, and ending at the point marked "X" on page 251; and also from the point marked "X" on page 268, ending at the point marked "X" on page 269.

Justice Stephens: Show it to counsel first.

(The grand jury minutes referred to were handed to defendants' counsel for examination.)

Justice Stephens: Show it to the Court, now.

(The grand jury minutes referred to were handed to the Court for examination.)

Justice Stephens: What was the first page reference?

Mr. Steffen: Page 251.

Justice Stephens: And the next was what?

Mr. Steffen: Pages 268 to 269.

Justice Stephens: Now you may show it to the witness.

Mr. Bromley: I object to this use of the grand jury minutes again as being entirely improper, and it seems to me that the second reference is a very clear demonstra-
4784 tion of the impropriety. They pick out certain parts of the minutes and mark them with an "X", and will not let us see what comes in between. It is impossible to tell whether the second reference is talking about before this bulletin or after. It is utterly impossible to tell what he is talking about or what time he is talking about.

The first reference is clearly to a period long after the issuance of the first bulletin, just as the witness said. But as to the second reference, there is no way to tell what time it refers to. I suspect it is likewise after the issuance of that bulletin, but it is impossible to tell from those excerpts.

Justice Jackson: Have you had an opportunity to look further into those minutes to see what the second portion has reference to?

Mr. Bromley: I have not.

Justice Jackson: I think you are entitled to know what it means, in order to intelligently examine him.

Mr. Bromley: I feel the same way.

Justice Stephens: The Court would see no objection to your looking at sufficient of the minutes to understand what that means. You don't object to that, do you?

Mr. Steffen: I have to make a formal objection, your Honor, to allowing counsel to look at any grand jury minutes other than those that are presented, but I—

4785 Justice Jackson: (Interposing) Suppose that that portion does not exactly give the picture?

Mr. Steffen: I was going to say that I think it is only reasonable that either the Court—ordinarily it would be the Court that would satisfy itself that those are the proper excerpts from the minutes—

Justice Stephens: (Interposing) We couldn't tell that ourselves without reading the balance.

Mr. Steffen: I have no objection to Mr. Bromley looking at the material between pages 251 and 268.

Justice Stephens: You may resubmit it to counsel.

(The grand jury minutes referred to were again handed to counsel for the defendants for examination.)

Mr. Bromley: May it please the Court, from a reading of the pages between 251 and 268, it is apparent that the testimony which is marked on pages 268 and 269, given by this witness before the grand jury, was all with reference to a meeting of licensees on November 15, 1932, more than two years after the bulletin leveling offff the jobber-dealer price was issued.

Justice Stephens: More than two years afterwards, you say?

Mr. Bromley: Yes, after the bulletin was issued by USG making the price to jobbers the same as to dealers.

So that in no way bears upon his testimony as to whether this matter was discussed prior to 1930 before the bulletin was issued.

4786 Mr. Steffen: Our point on that would be, your Honor, that the discussion in 1932, which is a continuation of discussions that they had had previously, and which referred to a matter that was obviously up as Mr. Bromley pointed out in the very first bulletin and in subsequent meetings, was a matter which would influence—what I mean to say is that the discussion had in 1932 would have a bearing upon what they were doing in 1930, because it was a continuation matter. I am showing this to Mr. Lenci simply to refresh his recollection.

Justice Jackson: Why don't you show it to him and ask him if it does refresh his recollection. Any explanation to clarify it can be brought out on recross.

Mr. Steffen: That is right. The page references are

page 251, and also pages 268 to 269, between the points marked with an "X".

(The grand jury minutes referred to were handed to the witness for examination.)

The Witness: Am I to read what is in between?

Mr. Steffen: No, just the marked portions.

Justice Stephens: Counsel has not asked you to read the intervening material; and Mr. Bromley has stated in your presence what it relates to, without denial. If the witness feels that he needs to read the intervening material, after reading the other material, to be sure what it means, the Court will allow him to do so.

4787 The Witness: (After reading the indicated portions of the grand jury minutes) I would like to briefly skim over what is in between there.

Justice Stephens: You may do so.

Justice Jackson: If it does not refresh your recollection, all you have to do is to say so.

Mr. Steffen: And if it does refresh your recollection, all you have to do is to say that.

The Witness: On page 268, where it starts in, it starts off with a question, "Let us take jobbers", and so forth, and I would like to see the line of questioning up to that point.

Justice Stephens: If the witness feels that in order to make sure whether it refreshes his recollection he should read the intervening material, he may do so.

The Witness: Thank you.

(The witness read the intervening material in the grand jury minutes referred to.)

Justice Stephens: What is the last question, Mr. Reporter? Let's get back to where we started.

(Thereupon, the record was read by the reporter, as requested.)

Justice Stephens: You have now read the intervening material, have you?

The Witness: Yes.

4788 Justice Stephens: Ask your question, Mr. Steffen.

By Mr. Steffen:

Q. My question is, does that refresh your recollection concerning any discussions you may have had with the

licensor, at licensee-licensor meetings, concerning the jobber situation? A. Yes.

Q. And when you said at page 4689 of the transcript that you had no part in making up the bulletin which the United States Gypsum Company issued in August, I believe, of 1930, eliminating jobbers or fixing the same price to jobbers as to dealers, you didn't want to exclude the fact that you had had such meetings and had talked over the elimination of jobbers with the licensor?

Mr. Bromley: I think that that ought to be specific as to whether it was prior to 1930 or subsequent to 1930.

Mr. Steffen: I will make it specific.

By Mr. Steffen:

Q. In August, 1930, there was a bulletin put out by United States Gypsum Company which leveled off the price to dealers and jobbers—do you remember that? A. Yes.

Q. And your answer here said that you had no part in making that up? A. That is right.

Q. And by that you meant that the United States
4789 Gypsum Company, of course, issued their own bulletins? A. Yes.

Q. You do not want to exclude the statement, however, that the licensees had met with the licensor concerning the jobber situation, do you? A. Well, it is my recollection that there was more discussion about the jobbers after 1930—

Q. (Interposing) Than prior to 1930? A. Yes.

Q. My question is—do those excerpts from the grand jury minutes, which have to do with meetings after 1930, refresh your recollection as to anything discussed prior to 1930? A. No, they do not.

Q. I now show you Government's Exhibit 438, which also has to do with jobbers, Mr. Lenci, and concerns your testimony on page 4758 of the transcript. I refer particularly to the first paragraph of that exhibit in which it says that selling through jobbers had been eliminated.

In your testimony, Mr. Lenci, you said:

"A. That is correct. It is merely shortened up there, because that is the way I understood it, and everybody else understood it the same way."

You followed that testimony with a statement to this effect:

"Q. And when you said that you understood it and that that is the way everybody else understood it, you
4790 meant that they all understood that all that had

been eliminated was the right of a manufacturer to sell a jobber at a discount, is that right?"

To which you said:

"A. That is correct, yes."

Now having read your testimony before the grand jury, does that refresh your recollection as to whether or not your statements on page 4758, to the effect that what you should have said was simply that the price had been leveled off, was correct? Do you get all that? A. No, I don't, I am sorry.

Q. Let me get at it in shorter questions, Mr. Lenci.

Have you looked at Exhibit 438? A. Yes.

Q. And the first paragraph speaks of eliminating jobbers? A. Yes.

Q. And you stated first that that was the way that everybody understood it, is that correct? A. Yes.

Q. Do you want to change that testimony?

Mr. Bromley: I object to that question. He didn't testify that that was the way everybody understood it at all—

Mr. Steffen: (Interposing) Just a moment, I will read your testimony, Mr. Lenci.

Mr. Bromley: At what page?

4791 Mr. Steffen: At page 4758.

Mr. Bromley asked you this question:

"Q. What you said was 'Referring to the recent bulletin of the United States Gypsum Company advising the licensees that selling through Jobbers had been eliminated.'

"You knew when you wrote that that all the bulletins had done was level off the price as between jobbers and dealers, didn't you?"

And your answer was:

"A. That is correct. It is merely shortened up there, because that is the way I understood it, and everybody else understood it the same way."

Now do you want to change that testimony, having examined your testimony given before the grand jury? A. I don't see how I can.

Q. That is a correct statement of what you intended to say, is it not?

Justice Jackson: What do you mean by "that"?

Mr. Steffen: By "that" I refer to the first paragraph of Exhibit 438 in which you said that you understood that the jobbers were to be eliminated.

The Witness: Well, to make it clear—

Justice Stephens: (Interposing) The statement there,

for the purpose of exactness of the record, is that selling through jobbers had been eliminated.

4792 Mr. Steffen: That is right.

The Witness: If I may make it clear, my understanding has always been of that particular bulletin that the practice of selling through jobbers at a price less than the dealer price had been eliminated, that the practice of selling them at the special discount had been eliminated, not that the jobbers themselves had been eliminated.

By Mr. Steffen:

Q. That comes down, as you state, however, to a shortened statement that sales, or selling to jobbers, had been eliminated, was the correct way of stating the matter—is that not right?

Justice Jackson: What matter?

The Witness: May I go back to my letter of May 6? The first paragraph of that letter, which is addressed to the Board Survey Company, is merely for the identification of the matter which I wished to discuss, with the various complaints I mentioned in the letter. The first paragraph is not intended as an interpretation, but merely as an identification so that the Board Survey would know what I was talking about.

By Mr. Steffen:

Q. I now want to take up another subject, Mr. Lenci.

At page 4693 of the transcript you state that the matter of taking out a license under the Roos foam patent was a matter of your independent judgment, and that it was

4793 because you desired to get the right to use the patents in your manufacturing process.

I think you testified, Mr. Lenci, that you made no examination of the patents before you reached your decision, did you not? A. That is correct.

Q. Did the United States Gypsum Company disclose to you just how to make board, prior to your taking the license in October, or November, 1929? A. They described it very fully at about that time, whether it was just before or just after, I don't recall.

Q. You are familiar with the license agreement and it provides, I believe, in the license agreement, that they will disclose to you the process as a part of their agreement? A. That is correct.

Q. Now on page 4698 of your testimony, Mr. Lenci, you referred to the matter of classifying housewreckers, as to whether they should be classified as dealers or contractors. Mr. Bromley there asked you the question:

"Now at this meeting of June 6th, was there a discussion about prices?"

And your answer was:

"A. No, I think the thing was an inquiry as to how housewreckers should be classified under the bulletins."

Had you been selling housewreckers as dealers?

4794 A. Yes, sir.

Q. Does your company sell to contractors? A. No.

Q. And do some of the companies sell to contractors? A. It isn't the usual practice.

Q. Do some of them sell to contractors? A. It has happened occasionally in very recent periods, only, during the war, principally on Government contracts, on barracks and buildings of that type.

Q. And the question came down as to whether you would classify housewreckers as dealers or contractors, and if they were to be sold as contractors, whether they would be sold at a different price than you would sell to dealers? A. They would not be entitled to the dealer price.

Q. It would be, ordinarily, a higher price? A. Yes.

Q. And you decided to treat them as dealers? A. They actually were dealers, and had existed that way for years.

Q. Dealers of a particular sort? A. Yes.

Q. At page 4698, Mr. Bromley asked you:

"Q. Was there any 'give and take' in the sense of a discussion, as to what should or should not be the practices or prices, followed by a vote or a decision in any form?"

4795 Your answer was:

"A. Oh, no, no."

That was never the case, was it, that there was a decision or a vote at that time by the licensees? A. That is right.

Q. The licensor heard statements or questions from each of the licensees, if they were so minded? A. Yes.

Q. And was there an expression of opinion? A. No.

Q. Did you say you thought you would like to classify housewreckers as dealers, or not? A. I misunderstood your question, I believe, I thought you asked—

Q. (Interposing) Whether the licensees would express their opinion? A. Yes, it was usually discussed by the

persons who brought it up. If I had a complaint or a question, I would bring it up, and the United States Gypsum would say, "Well, we will think about it and decide what we are going to do."

Q. And if any other licensee had an opinion on the matter, or had a different view on the matter, he expressed it? A. If he was interested, he did.

Q. And the United States Gypsum Company more or less stood as an umpire between the different parties
4796 there, if there was a difference of opinion? A. No, I wouldn't say that they acted as an umpire, because very often we might want something and feel we were entitled to it, and they would make their decision based very largely, we felt, on their own policy.

Q. On what was good business for them? A. Yes.

Q. You also say on page 4699: "You must realize that those bulletins were entirely new to all of us".

By that what did you mean, that they provided many new conditions such as billing weights and basing points and new prices, and size of truck deliveries, and so on? A. What bulletins does that answer refer to?

Q. This apparently had to do with the period between June 6th and following.

Justice Stephens: Of 1929?

Mr. Steffen: Of 1929, up to the first audit, I believe.

The Witness: That is what I thought. Well, the whole idea of the bulletins was new, and a great many of the matters embodied in the bulletins were not clearly expressed, we couldn't understand them, and we naturally had to have the bulletins clarified.

By Mr. Steffen:

Q. Now on page 4700 this question was asked:

"Q. Now the giving away of filler by the manu-
4797 facturers was not a custom in the sense that it was generally accepted or approved practice in the industry, was it?"

And you said:

"A. It was decidedly not approved."

That had been the practice in the industry, though, to give away filler or carpenters' aprons, or things of that sort? A. No, I think I said it was not the usual practice.

Q. But there had been instances where that was done? A. There had been very few, very rare instances.

Q. And that was brought up at a licensee-licensor meeting and there was general disapproval expressed by the in-

dustry present? A. Wasn't that one of the points brought up at that meeting where Mr. MacLeish told us—

Q. (Interposing) I think so. A. I think he was the one that expressed the opinion to us and said that that was one of the attractions that had been offered. It wasn't an opinion on our part.

Q. He stated to you it was an attraction, and you agreed that it was a bad practice, or did you? A. I don't think we agreed, we just accepted it. He said so and that was it.

Q. Now on page 4703, a reference is made to protected job contracts, and on that page Mr. Bromley asked you this question:

4798 "Q. However, there was again another rule, do you recall, among the Fair Trade Practice Rules, Rule 16, which provided that a contract of sale which permits the buyer to cancel, or provide for a reduced price in the event of a market decline, and which does not permit the seller to cancel, or provide for an enhanced price in the event of a market rise, is lacking in mutuality and tends to induce controversy and breach of contract, and is therefore condemned by the industry?"

To which you answered:

"A. Yes."

Is that your testimony? A. Yes, that was referring to the Federal Trade Commission rules, wasn't it?

Q. It says so, yes. A. Yes.

Q. And by "condemned by the industry" you mean condemned by your company and the United States Gypsum Company, and the other licensees? A. Under that Federal Trade Commission Fair Practice Law, yes.

Q. And only as it comes under the Federal Trade Commission Fair Practice Rule No. 16? A. Yes.

Q. As a matter of fact, Mr. Lenci, is there still a practice to protect prices on jobs? A. Yes, you have

4799 to do that.

And is that what was meant by the rule? A. No, it is just the opposite. The rule, if it were followed by the industry, would be of benefit to the industry, but as the business practice has been built up throughout the years we protect against an increase, but if there is a decrease, the contractor pays the lesser price on a protected job.

Q. So that although it is condemned by the industry, the industry still follows that practice? A. Yes, we have no way of enforcing it.

Q. Well, as a matter of fact do not the bulletins provide regulations concerning the extent to which you may protect jobs? A. I don't recall that they do.

Q. Aren't there very explicit provisions as to what will constitute a job and for what length of time you may protect a job? A. I don't recall that.

Justice Stephens: We will take the noon recess at this time.

(Thereupon, at 12:15 o'clock p.m., a recess was taken until 1:45 o'clock p.m. of the same day.)

4800 AFTERNOON SESSION

(The trial was resumed at 1:45 o'clock p.m., pursuant to recess.)

Justice Stephens: Proceed.

Whereupon, GEORGE N. LENCI resumed the stand and testified further as follows:

Redirect Examination (resumed)

By Mr. Steffen:

Q. Before the recess, Mr. Lenci, we were speaking about the protected job contracts, and the length of time that a licensee would be permitted to protect a job, especially on gypsum board and gypsum lath.

I want to show you Government's Exhibit 37, page 530, which appears at the top of page 95 of the complaint.

(Exhibit 37 handed to the witness.)

By Mr. Steffen:

Q. In the second paragraph, it refers to advances in minimum price—

Justice Stephens: (Interposing) Page 95 of the complaint?

Mr. Steffen: That is correct.

Justice Stephens: Paragraph No. (2)?

Mr. Steffen: Especially No. (2), yes, Your Honor.

By Mr. Steffen:

4801 Q. I ask you, Mr. Lenci, if that is a regulation of these protected job contracts, as you understand it? A. Yes.

Q. There have been no price changes in several years, have there? A. This bulletin is dated in 1939. I don't believe there have been.

Q. What I meant to say is that you have had no occasion to refer to this particular bulletin in several years? A. No, that is right.

Q. You would change your testimony, Mr. Lenci, that there is a regulation, then, in the bulletins? A. Yes. I wasn't sure this morning whether it had been published or not.

Q. Now I would like to take you to page 4709 of the transcript. It is a little indefinite, Mr. Lenci, as to when you decided to take out your bubble license. The question is, at the foot of the page:

"And you thereafter did decide to take the bubble license, did you?"

And your answer:

"We did."

The reference is to a statement made by Mr. MacLeish, according to your testimony, to Mr. Rippey, suggesting that you should make up your mind about whether or not
4802 you wanted to take out a license, before you talked about the form of the license.

As a matter of fact, you made up your mind fairly shortly after the May 23 meeting, did you not, to take out a license under the bubble patent? A. Yes.

Q. And by a "very short period of time", what could you say you meant? A. Well, I couldn't place it in days.

Q. That is, you had substantially made up your mind as you went home from the meeting? A. Yes, sir.

Q. Now, I want to refer to your testimony beginning on page 4734. At that point, Mr. Lenci, you were asked this question:

"For instance, if you were told that you could sell gypsum board at $13 per thousand square feet at your mill, would that enable you to operate as a commercial business matter?"

And your answer was:

"No."

Do you remember that testimony? A. Yes.

Q. I want to ask you whether, prior to May, 1929, you were not able to operate as a business matter, even
4803 though you didn't even have a base price given you? A. Well, we weren't working with a base price, we

were working with what price we had to meet at the destination where our competitors were making the prices.

Q. That is, you had to meet competition in 1928 and 1929? A. We had to meet the prices in effect at the destination point, as we found them.

Q. And you could adjust your prices, or your trucking, or the size of your loads, or any other matter that you saw fit, to meet competition, could you not? A. Yes.

Q. Now, what did you mean, then, when you said that you couldn't operate as a commercial business matter if all that was given you was a $13 per thousand square feet at your mill price? A. Well, to give you a very simple illustration of it, we were simply given a mill price of $13, and one of our competitors who had a plant in Philadelphia was making a price on his product, delivered to the dealer's yard, of $14.10, there is only a difference of $1.10 per thousand square feet in there. If we were bound by the $13 at our mill, and had to add to that the freight to destination and the trucking charge from destination to the dealer's yard, we couldn't operate. That is what I meant by that answer.

4804 Q. Well, you go on and state here—and I will refer you to another question that Mr. Bromley asked you, on page 4736:

"In other words, you mean by that, that you would have to know whether that price applied to a large quantity or a small quantity, wouldn't you?"

And you said:

"Yes."

A. Yes, that is another line of thought, too. There were a number of reasons.

Q. Then he asked you:

"And you would have to know whether that price applied to a situation where you were expected to make free delivery, or whether the customer was to pay for the delivery, wouldn't you?"

A. Yes.

Q. And your answer was:

"Yes."

A. That is the one I just illustrated.

Q. This is another question asked you by Mr. Bromley:

"Now a switching charge, to which reference has just recently been made, is a part of the freight charge made by the railroad, isn't it?"

And you said:

"That is correct."

4805 What I am getting at, Mr. Lenci, is this: Mr. Bromley's questions were directed to the point that if there was only a $13 f.o.b. mill price specified, he wanted to know whether you could do business on that basis or not, and what I am trying to make clear is on what basis you were answering.

If you were in a state of competition with your other licensees and licensor as in 1928 and 1929, you could operate without having any price fixed, isn't that correct? A. Yes.

Q. Now, when the licensor fixed a price of $13 f.o.b. mill, did you mean that you couldn't operate at all, as a business matter? A. Yes.

Q. Well, wouldn't it have been possible, Mr. Lenci, for you to have sold in any size carload or truck that you saw fit? This is Mr. Bromley's hypothesis. Suppose that the licensor says that your price at the mill is $13. A. Yes.

Q. And he makes no other regulations. Isn't it then open to you to sell in such size truckloads and in such manner as you see fit? A. No, we couldn't operate.

Q. Well, what you are getting at is that you would be running into competition? A. Yes.

4806 Q. And that you couldn't operate, in the sense that you wouldn't be competitive; is that what you mean? A. Yes, we would be automatically tied to a price which would not be competitive.

Justice Jackson: Do you mean that you would lose money selling at that price?

The Witness: You couldn't even get business to lose the money with.

By Mr. Steffen:

Q. What Mr. Bromley assumed is that the price would be fixed as to your company, and also as to each other company, at $13 f.o.b. mill. A. That still wouldn't permit us to operate.

Q. Why not? A. Well, take the extreme. Suppose I am operating with a $13 mill price—

Q. (Interposing) And suppose here is a National plant— A. (Interposing) And that is operating at $13. Now the customer wants to buy a carload of board at your destination.

Q. Suppose I am in Rochester. A. Take it at New York.

Q. All right. A. You are in New York. The cus-

4807 tomer wants to buy. All right. I am tied down to a

$13 mill price, and so are you. Now your cost to him is a $13 mill price plus merely your delivery charge.

Q. That is right. A. He won't buy from me at $13 at my plant, 400 miles away. So I have got to be permitted to be competitive, which the bulletin permits.

Q. In other words, what you are getting at is that in order to be competitive, it was necessary that all these other matters be regulated? A. The bulletins were the means of making us competitive, not the means of making us non-competitive.

Q. That is right. A. Yes.

Q. And in order to make you competitive at any point, it was necessary, for example, to fix a uniform billing weight, was it not? A. Yes.

Q. That is, so that the delivered price would be uniform? A. Yes.

Q. The freight would be based on a uniform rate? That is, the freight charge to the customer would be based on a uniform billing weight? A. Yes.

4808 Q. And that would apply also as to whether it was large or small quantities? A. Yes.

Q. In order to be competitive, each of the licensees would have to agree to sell, or would be told to sell, only in certain quantities, is that correct? A. Yes.

Q. And you mean the same thing, for example, with regard to switching charges, that you would have to agree that the switching charges in Grand Rapids would be so much; is that right? A. No, we didn't agree—

Q. (Interposing) You were told? A. We were told that if there was a switching charge, that would have to be added to the price, if that was the condition existing at that particular point.

Q. And that that was intended to make you competitive with each of your other licensees selling in that same territory? A. Yes.

Q. Now, let's get at this word "competitive". By "competitive", you mean that selling conditions, price and selling conditions, were uniform; is that correct? A. Yes. You start out with a uniform base, the mill price. Now a great many of these matters that are covered in the

4809 bulletins are exceptions, cutting below that base.

Q. For example? A. The one I gave you a few minutes ago, that our price, after we shipped the material to New York, our price back at the mill is much lower than your mill price if you have your plant at New York, which

is a cut below the base price shown in the bulletins, in order to meet the condition existing at the destination due to a local mill being established in that territory.

Q. Well, let me get— A. (Interposing) I am sorry if I don't make myself clear. I am trying to.

Q. I know that. I want to get very clear in my mind as to the meaning of this word "competitive". As I understand it, what you mean is that you start with a uniform price at the mill. A. Yes.

Q. That makes you competitive in that respect with all other licensees, as you understand the term? A. Yes.

Q. And when it is agreed that you shall ship in certain carload lots at carload lot prices, and not at smaller-than-carload-lots at carload lot prices, that makes you competitive as to the size of your shipments? A. Yes.

4810 And when it is agreed or ordered that your trucking will be in 7500 board feet truckloads, and not smaller, that makes you competitive with your other truckers? A. Yes.

Q. And when it is ordered that you can truck only in certain areas at certain prices, that makes you competitive with each of your other licensees? A. Yes. But those, again, are all variations from the basic price established in the bulletin, which is the mill price plus carload freight to destination.

Q. We understand that. A. Do you see what I mean?

Q. Yes. A. Your bulletin starts out with the idea that the price is so much at the mill, plus the ICC freight to destination.

Q. Based on an arbitrary weight? A. Based on the arbitrary weight, if you want to put it that way.

Q. From a designated shipping point or basing point? A. Yes. Then they start and give us these other conditions that enable us to meet competition as we find it existing in other points.

Justice Stephens: What other conditions?

Justice Jackson: To be able to meet the figure of

4811 the fellow closer to destination?

The Witness: Yes. For instance, where he has no freight to pay and we have to pay $5 in freight, that $5 has to come out of our mill price.

Justice Jackson: That has to come out of your mill price?

The Witness: Yes, or we don't do any business.

Justice Stephens: What do you mean by that—it has to come out of your mill price?

Justice Jackson: You can't take it out of your freight, can you?

The Witness: No.

Justice Jackson: And you can't take it out of your trucking?

The Witness: No.

Justice Jackson: And if you are to meet the price, it has to come only out of the mill price?

The Witness: Yes.

Justice Stephens: I should think that would not make you competitive, but would make you take a loss.

The Witness: It would do so, very often, if you want to meet that condition. We do take a loss in a number of our plants.

Justice Jackson: That is what I asked you a few minutes ago, if it meant a loss to you; and you said no, you
4812 couldn't get the business at all.

The Witness: I thought you meant that if we didn't take the business at all, would it mean a loss.

Justice Jackson: Oh, no.

The Witness: That is right.

By Mr. Steffen:

Q. Do I have it clearly in mind, Mr. Lenci, and correctly in mind, that when you say you want to make yourself competitive, you are in effect eliminating competition with your licensees as respects the particular matter?

For example, when you have a uniform billing weight, each of the licensees is going to sell at the mill base price plus freight based on a uniform billing weight, and that makes you competitive, as you say, with each of your other licensees; is that correct? A. That is correct up to that point.

Q. And when you say "makes you competitive", it in effect means eliminating competition, does it not, on the point in question? Let's take an illustration—

Justice Stephens: (Interposing) Let him answer the question.

The Witness: Well, I can't answer that correctly.

Justice Stephens: Answer it as correctly as you can, if you can.

The Witness: Mr. Steffen started to say, "Let's
4813 take an illustration". Our plant is in Wheatland in Upper New York State. When we ship to Washington, our freight is roughly $5 per thousand. The United

States Gypsum Company has a plant in Philadelphia. Their rate to Washington, we will say, is $3 per thousand. They take their mill price and add $3 per thousand, which would make a price down here of $16. Now, we have got to ship and sell to the customer at that price, we can't get $2 a thousand more because our plant is too far away. So in order to be competitive, we have to cut our price $2 to meet that circumstance, and the only place that can come from is out of what is left at the mill.

By Mr. Steffen:

Q. Isn't that exactly what you did, Mr. Lenci, before you had any price fixing at all? A. Yes.

Q. If you wanted to get into the Washington market, you had to— A. (Interposing) We had to—

Q. (Continuing) —you had to take something from the price at one place or another? A. Yes, certainly.

Q. Let's take this question, Mr. Lenci: Suppose that your competitors were making a 1500 pound board, and you were making a 1600 pound board, would it not be possible for you to price your board at, let us say, $13 mill
4814 base price and charge your freight on exactly the weight of your board? A. No.

Q. You would not be able to sell in competition with the others? A. No, sir, of course not.

Q. You would not be competitive? A. No.

Q. And therefore, to make you competitive, or to eliminate any question of competition in that case, you agree upon a weight for the board? A. That gets back to the standard weight in the bulletin, yes.

Q. And by establishing a weight in the bulletin for board, a uniform weight, it will allow each licensee to eliminate any competition based upon the difference in the weight of the board and the freight that would have to be paid upon it? A. Yes.

Q. And isn't that true with respect to trucking, for example—

Justice Stephens: (Interposing) Before you leave that, let me ask a question, to keep myself clear on this situation.

Is there a parallel between those two cases? You have to pay actual freight to the railroad, do you not?

The Witness: Yes.

4815 Justice Stephens: In the previous illustration you were giving?

The Witness: Yes.

Justice Stephens: Despite the fact that an arbitrary rate is fixed in the bulletin?

The Witness: Yes.

Justice Stephens: Each of the companies you are supposing in your illustration have to pay the actual freight rate?

The Witness: Yes.

Justice Stephens: Do you have to pay on an actual weight in the second illustration, or do you pay on a theoretical weight?

The Witness: To the railroads?

Justice Stephens: Yes.

The Witness: It is a weight which is arrived at by the railroads' making periodical weighings of board at a plant, and reaching what they call an average weight agreement, and that varies from time to time.

Justice Stephens: Is it an approximation of actual weight?

The Witness: Yes.

By Mr. Steffen:

Q. Now, let's take the trucking illustration, Mr. Lenci. If there were no regulations as to the size of the truckload, you might find it profitable to ship, say, 5,000
4816 or 6,000 board feet in a truck, might you not? A. Not actually so.

Q. If you had a very good customer who wanted 6,000 board feet, might it not be profitable to ship 6,000 instead of 7,500? A. I don't think it would.

Q. At least, prior to the bulletins you were permitted to do that if you wanted to? A. Yes.

Q. Now let's suppose this situation. Suppose you have, in a town, say, 50 miles away, two dealers; and each of them wants to get, say, 4,000 board feet. You could pool that truck, could you not? A. That could be done, yes.

Q. Could that be done under the bulletins? A. No. The way the bulletins read, the two customers that were on the load, if that did happen, each would have to be the minimum amount.

Q. Each would have to have 7500 board feet? A. If that was the minimum at that time.

Q. It might be profitable to you to ship at one time to two dealers in the same town, or immediate vicinity, in 4,000 foot lots, might it not, if you were permitted to do that?

A. It might be. I don't recall, even, that we did that
4817 before we had the license.

Q. But if you were to do that, and another licensee were not to be permitted to do that, there would be competition between you on that basis, would there not? A. Yes.

Q. And the effect of the bulletin is to make you and your other licensees competitive as to the size of the truckload, is it not? A. Yes.

Q. And by "competitive", you mean that you eliminate any possibility of competition on the basis of additional accommodations or additional aid given by shipping in smaller or different sized truckloads? A. That is right.

Q. I want to take you to page 4743 of the transcript, where Mr. Bromley's question there referred to competitors. He says:

"Didn't you find out, after you had been in operation under the license for a couple of years, that all kinds of ways were being devised by your competitors"—by the word "competitors", you meant primarily competitors not on a price discrimination level, but on a level of getting business by friendship or otherwise? A. Wasn't that referring back to the analysis made by Mr. MacLeish, of the audit?

4818 Q. I think so, yes. It had to do with the violation of minimum terms set by the licensor. A. Yes.

Q. I wanted simply to get at the word "competitors". The word appears at several places in your testimony. A. That means the other manufacturers of gypsum board.

Q. And you didn't mean by that that there was any competition on a price level? A. Well, all of those things affected the price.

Q. Well, I mean, as between licensor and licensees, the effort was to get rid of any competition on the price level, was it not? A. It was to get rid of those violations that did affect the price, yes.

Q. That is right, and to thereby eliminate any competition between licensor and licensees, or the licensees themselves, as respect those so-called violations? A. Yes.

Q. On pages 4754 and 4755, there are still other references to competitors. I will refer you to Mr. Bromley's question at the top of page 4754:

"In other words, if one of your competitors violated his contractual obligations under the license and made an indirect price cut, that fact alone might mean the difference

between your getting the business and his getting the
4819 business, is that right?"

And you said:

"It very definitely did."

A. Yes.

Q. And by "competitors" there, you meant that the competition was on, or should be on, some level other than price? A. Yes.

Q. Your purpose was to eliminate any competition as to price, or anything having to do with price, as regulated in the bulletins? A. Yes.

Q. There are several references on page 4755 concerning—

Mr. Bromley: (Interposing) I don't know what counsel meant when he said, "Your purpose was to"—did you understand the question?

The Witness: I thought I understood it.

Mr. Steffen: That the purpose of the bulletins was.

Mr. Bromley: You didn't say that.

Mr. Steffen: No, I said "your purpose"—that the purpose of the bulletins was to eliminate any matter of competition based upon price or based upon anything having to do with price, the various things that were taken up in the bulletins concerning truckload sizes, and so forth.

4820 The Witness: I thought you were referring to the bulletins. That is the way I understood it.

By Mr. Steffen:

Q. That is what I wanted to get.

On page 4757, Mr. Lenci, there is a reference to the Board Survey, and Mr. Bromley asked you this question:

"Now, there was nothing secret about these complaints, was there, Mr. Lenci, so far as you were concerned?"

And you answered:

"Not a thing."

Then he said:

"And you meant what you wrote to Board Survey, didn't you, when you complained?"

And you said:

"Yes, we certainly did."

When you state there was nothing secret, is that strictly accurate? Isn't it a fact that your complaints to Board Survey were not communicated to the licensee who may have been complained of, that is, your name was not com-

municated? A. I don't know how they handled it, but I thought our name was communicated.

Q. Did you have any complaints made to you by Board Survey which gave the name of the complainant? A. I don't remember whether we did or not. I can't just place any particular complaint.

4821 Q. You are familiar with the form of complaint that was put out by Board Survey? A. Yes.

Q. And you filled those out yourself? A. Yes.

Q. The ones that you received, do you remember whether they had the name of the complainant, or was it simply the Board Survey saying that there was a complaint made against you? A. I don't remember, I don't remember.

Q. I would like to show you Government's Exhibit No. 500 as simply one example of a complaint; also Government's Exhibit 497.

(Government's Exhibits 500 and 497 handed to the witness.)

By Mr. Steffen:

Q. In either of those two exhibits, is there any reference to the name of the person making the complaint? A. No.

Q. Do you recall ever having received a complaint with the name of the person making it, on it? A. What I was trying to remember was if we had any complaints against us when we were using that blank to be filled in.

Q. You don't recall, then, ever having seen the
4822 name of the complaining licensee? A. I don't remember, no.

Justice Stephens: Where are those exhibits that consisted of the complaint form itself, sent out by a complaining licensee?

Mr. Knuff: Exhibits 513-A, 514, and 515. Exhibit 513-A is a complaint by Ebsary to the Board Survey about the Kelley Plasterboard.

Justice Stephens: Exhibit 513-A is a complaint against Kelley Plasterboard signed by Ebsary?

Mr. Knuff: That is right. Exhibit 514 is the answer of Kelley Plasterboard to the Board Survey on that complaint. You will notice that the Ebsary Gypsum Company's name doesn't appear at all on that form.

Justice Stephens: I see.

By Mr. Steffen:

Q. I would now like to take you to your testimony on page 4765, Mr. Lenci. That had to do with exchanges of board, and I think you testified there that it had been the practice, on the part of some people, to go to the Kelley plant and pick up less than the quantity, or of trading boards with the Kelley Plasterboard Company—do you recall that? A. Yes.

Q. At page 4770, you testified that there was no bulletin regulation as to that, as you recalled; is that correct?

4823 A. Yes.

Q. Do you know whether that practice of allowing a dealer to come to a plant and exchange boards has been discontinued? A. I believe it has.

Q. And it was not discontinued by means of a bulletin? A. I don't recall. I don't think it was in the bulletins, I am not certain.

Q. You don't know whether Mr. Henning, or someone from USG, told Kelley to discontinue the practice? A. It probably came to Kelley in the form of a complaint, that he was doing such a thing.

Q. The complaint was made to Board Survey, and came back to Kelley? A. That would be my—

Mr. Bromley: (Interposing) I move to strike out the prior answer as pure speculation.

Justice Stephens: It seems to the Court that it is just a speculation on the part of the witness.

Mr. Steffen: I think that is right, in so far as he said "probably".

Justice Stephens: It may go out.

Tell what you know about it.

By Mr. Steffen:

Q. You don't know as a fact whether any such

4824 complaint was made to Kelley by Board Survey? A. No, I don't.

Q. My attention has been called to the fact, Mr. Lenci, that we didn't conclude the questioning concerning the secrecy, if any, involved in your complaints to Board Survey. Are you prepared now to say that those investigations were entirely open, or were they secret? A. Well, I think that the question gets itself into two parts. You led it along into these formal complaints. But as I recall it, there was some questioning as to any secrecy when we happened

to make the complaints at one of these board meetings. If we had a complaint to make, we didn't make it in secret.

Q. If you made a complaint at these licensee meetings, there was nothing secret about it? A. If we had a complaint about another company, we didn't go over in the corner about it, but stated our case publicly.

Q. But after the Board Survey Company was instituted, the complaints were in writing to Board Survey, were they not? A. Yes.

Q. And so far as you now recollect, you didn't receive, when a complaint was made against you, the name of
4825 the complaining licensee, did you? A. I don't remember, no.

Q. Now, I would like to take you to page 4772, and also page 4779 of the transcript, where you testified concerning splitting commissions. Do you recall that you testified in connection with Dusol, as being on a commission basis either with his brother or with the Kelley plant, or both? A. Yes.

Q. And that there was a regulation opposed to splitting commissions; do you remember that? A. Yes, there is a regulation in the bulletins.

Q. And on page 4779, this question was asked:

"Wasn't it your understanding that the license bulletins of USG did not outlaw commission men, as such, but merely were aimed at prohibiting the practice of splitting commissions with customers to effect a reduction in the price?"

And you answered "Yes.", to that. A. Yes.

Q. I want to show you Government's Exhibit 37, page 936—or page 555.

Will you please read that, Mr. Lenci? A. Yes, sir.

Mr. Steffen: I understand it will be page 555 in Your Honors' sets of exhibits. There were two numberings, and it is confusing.

By Mr. Steffen:

4826 Q. Have you read Government's Exhibit 37, at page 555, Mr. Lenci? A. Yes.

Q. And that explicitly says, does it not, that the licensor will regard the sale of patented board by commission salesmen, without the written consent of the licensor, as a violation of the terms of the license agreement? A. Yes.

Q. And would you prefer now to change your testimony as it appears here on page 4779? A. Well, to my knowledge, I don't know that any complaint or any action was ever

taken against any company which had legitimate men on a commission basis.

Q. But the regulation was about the time Mr. Dusol was operating, was it not? A. No, this is much later.

Q. And the regulation, in terms at least, would provide that licensees might not engage a commission salesman except under the penalty that the licensor would regard any commission paid to commission salesmen as a reduction in price? A. Yes.

Q. This provision that I have cited you, in Government's Exhibit 37, page 555, appears at other points in the license bulletins, I believe, Mr. Lenci, does it not?
4827 A. I am not sure whether it appears exactly in that same form or not.

Q. You were referred, in your direct testimony, to Government's Exhibit 37, page 530, which has to do with rebates and allowances, and also page 531, which has to do with rebates and allowances, and I imagine that is what you had in mind when you made your answer here on page 4779? A. Yes.

Q. The answer on page 4779 seems to say that the only thing appearing in the license bulletins was a prohibition of the practice of splitting commissions where that would effect a reduction in price by way of rebate. And that would be governed by Exhibit 37, page 531. But this exhibit, Exhibit 37, page 555, is a separate and distinct provision, is that correct? A. Yes, but I would take it that that would be modified by the matter on page 531 of the same exhibit. Those paragraphs, that is, the paragraph on page 555 is headed "Allowances, Etc."; and the one on page 531 is headed, "Rebates, Allowances, Etc." I would take it that that superseded the earlier one.

Q. This is a matter of construction, Mr. Lenci. You would have to examine all the license bulletins. There are several provisions. A. It happens in this folder that
4828 you have the later one bound ahead of the earlier one, which is rather confusing.

Q. That is the way they were furnished us, Mr. Lenci.

I want to take you now to page 4782 of your testimony. Mr. Bromley asked you this question, concerning jobbing, warehousing or trucking arrangements:

"Q. But that the only prohibition was that you should not use a warehouse arrangement as a secret or indirect way to lower the price of the board which you were selling to the dealer from whom you leased warehouse space?"

To that you answered:

"A. That is correct."

Now, that refers to this same matter of leasing a warehouse, for a licensee to lease a warehouse at the dealer's place of business, and thereby to possibly effect a rebate, is that correct? A. Yes.

Q. And the effect of your testimony is that the only prohibition in the bulletins with respect to that matter was this Exhibit 37, page 531, having to do with rebates and allowances.

Now I want to show you Government's Exhibit No. 38, page 112.

(Exhibit No. 38 handed to the witness.)

By Mr. Steffen:

4829 Q. It is dated June 30, 1932. Are you familiar with that provision, Mr. Lenci? A. Which paragraph do you mean, the first paragraph?

Q. The second paragraph. A. Yes.

Q. Stating that: "The establishment or continuance of warehouses, consigning of stocks, or extending other than regular terms, with dealers or other buyers will be construed by Licensor as a rebate and in violation of the minimum price where merchandise is sold at the minimum price."

Are you familiar with that provision? A. Yes.

Q. Isn't it a fact, Mr. Lenci, that the matter of warehousing at a dealer's place was discontinued by the industry? A. Well, to my knowledge, there were only one or two cases of that kind.

Q. And they were discontinued? A. One was a matter of complaint, down in Perth Amboy, New Jersey, that we made against the National; and another one, I believe, against the Certain-teed in Boston. Those are the only two that I remember.

Q. And those were both discontinued? A. Those were discontinued.

Q. Do you recall about the time of those two
4830 instances, Mr. Lenci? A. No, but they must have been early in the 30's.

Q. When you testified on page 4782 that the only prohibition was that you should not use a warehouse arrangement as a secret or indirect way to lower the price of the board which you were selling to the dealer from whom you

lease warehouse space, you had in mind, did you not, the rebate provision which is Government's Exhibit 37, page 555?

Justice Stephens: You mean 531, don't you?

Mr. Steffen: Yes, Your Honor.

The Witness: Yes.

By Mr. Steffen:

Q. Your answer is yes, you say? A. Yes.

Q. On page 4788, Mr. Lenci, this question was asked you: "Q. Well, as of this date, the practice of shipping board on consignment was condemned by the gypsum industry as an unfair trade practice, wasn't it?"

And you gave two reasons, as I recall—one, that a shipment might be made to a dealer, and the dealer might dispute, might make a false claim, concerning the amount of board received or the shrinkage, or something of that sort, and that would constitute a possible price cut, as you understood it. A. Yes.

4831 Q. Now let me ask you as to an ordinary shipment today. Is it not possible for the dealer to enter a complaint that his shipment was short, or that there were boards broken in transit? A. Yes, but there is a difference between the two.

Q. What is the difference? A. If you have a shipment to a customer and he complains that the material was short, you have the immediate opportunity of investigating and checking up with him. But in the case of a consignment, the stuff may be shipped 3 or 4 months before, and he has sold a lot of it out in small quantities, and then when he is all finished he doesn't have as much left as his inventory shows, and he says, "Well, your shipment must have been short", and there is no way of checking it up.

Q. And the industry regarded that as very bad business, to ship on consignment? A. Yes.

Q. And that was the reason, then, for having this provision which I have read you, or which you have before you there, Government's Exhibit 38, page 112, the second paragraph? A. Yes.

Q. Your answer is yes? A. Yes.

4832 Mr. Bromley: If he knows.

Do you know what the reason for it was?

By Mr. Steffen:

Q. Would that be your reason? A. That would be my interpretation of it.

Mr. Bromley: I move to strike out the answer, then. This is a provision in our bulletin.

The Witness: This bulletin wasn't referred to until after I got through answering all the questions.

Mr. Steffen: That is right.

Justice Stephens: Read the last two questions. I couldn't hear one of them.

(The record was read by the reporter as requested.)

Justice Stephens: I think the answer should go out, the witness' interpretation of the bulletin. The Court will have to make that.

Mr. Steffen: What is stricken out?

Justice Stephens: Just his interpretation of the bulletin, the statement that this is his interpretation of the bulletin. You are not foreclosed from asking him how the industry regarded the practice or, if he knows, what the purpose of the bulletin was.

Justice Garrett: That would include the previous answer also, because one was the reason, and he answered that, and then after the objection he said that that was his
4833 interpretation; and I take it that they are so connected that the answers to both would go out.

Justice Stephens: That is correct.

By Mr. Steffen:

Q. That would be your understanding of the purpose of the provision, Mr. Lenci? A. Yes.

Justice Stephens: You gave, as I recollect your testimony, also an additional reason, did you not—

Mr. Steffen: (Interposing) I was just coming to that.

Justice Stephens: Thank you. That had to do with the matter of investment, as I remember it.

4834 By Mr. Steffen:

Q. You had a second reason, which was that if one licensee should ship on consignment to a dealer, and another licensee were to sell only on the usual terms, it would be, in effect, giving an advantage to the first licensee, is that correct? A. Yes.

Q. I want to ask you this question—wouldn't it have been possible for the industry to have allowed all licensees to ship on consignment, if they saw fit? A. How did your question start?

Q. Wouldn't it have been possible, as it was prior to 1929, I take it, for the industry to permit any licensee to ship on consignment if he saw fit, so that, to be perfectly fair to any other licensee who didn't ship on consignment it would be open to him to ship on consignment if he saw fit? A. The USG could have made that arrangement if they had wanted to, but we had no interest in consignments.

Q. You didn't want consignments? A. No, in our total business experience we never had but one, and that was so bad we never wanted to do it again.

Q. I was simply getting at the question of fairness. It would have been fair if all licensees had been privileged to ship on consignment, if they wanted to?

Mr. Bromley: I object to that as incompetent
4835 because calling for a conclusion.

Mr. Steffen: It goes directly to the question, your Honor, in which it is stated that it would be an unfair trade practice, and I think his answer is based upon the assumption that some would and some wouldn't.

Justice Stephens: I think it is argumentative, Mr. Steffen, and I think my colleagues agree with me. Whether or not it would have been fair to allow all licensees to ship on consignment is a matter which you can argue to the Court from the testimony of the witness and from the bulletins and from the general circumstances that he has described. Objection sustained.

By Mr. Steffen:

Q. I want to ask you one more question on that. On your shipments to dealers do you take the risk of loss, Mr. Lenci? Loss in transit, I mean? A. No.

Q. That is borne by the dealer? A. Well, as a matter of fact, as to breakage in transit the dealer either files a claim with the railroad or delivers the proper papers to us and we file the claim.

Q. And the railroad always pays? A. Not always, but in most cases, because we try to put in only claims that are fair and can be substantiated.

Q. If the railroads do not pay, who takes the loss?
4836 A. That is a matter of adjustment in each case, adjustment with the customer, in case the railroad does not accept the loss.

Justice Jackson: Did you ever go into court about it where the railroad refused to accept responsibility?

The Witness: No.

By Mr. Steffen:

Q. Do you assume any responsibility with your customer as to loss in transit? A. I say that that is a matter of adjustment in each case.

Q. I mean on some occasions you do? A. On some occasions we have, yes.

Q. Do you regard yourself as obligated to make good any losses in transit? A. Well, usually the customer has the money.

Q. What is that? A. Usually the customer hasn't paid for the goods, which gives him a little advantage.

Justice Stephens: In other words you give a certain amount of discount time and ordinarily the loss would have occurred within that time so that the customer would still have the money, is that it?

The Witness: Yes; usually if breakage has occurred it can be seen as soon as the car is opened.

4837 By Mr. Steffen:

Q. I now come to certain testimony on pages 4804 to 4819, inclusive, beginning at the bottom of page 4804, all of which has to do with the NRA regulations.

Mr. Steffen: I would like at this time to move to strike all of that testimony beginning at the bottom of page 4808, and carrying over to the end of page 4819, upon the ground that it is incompetent, irrelevant and immaterial, and not proper cross examination.

Justice Stephens: Wasn't there a similar motion made heretofore?

Mr. Steffen: I doubt it.

Mr. Bromley: Yes sir.

Mr. Steffen: I would like to call your Honor's attention in this connection, if I may, briefly to the NRA statute, to Section 5 of the National Industrial Recovery Act, which reads this way:

"While this Title is in effect, or in the case of a license, while Section 4(a) is in effect, and for 60 days thereafter, any Code, agreement or license, approved, prescribed or issued and in effect under this Title, and any action complying with the provisions thereof, taken during such period, shall be exempt from the provisions of the Anti-Trust laws of the United States."

That is the provision in the NRA Code, or in the
4838 NRA statutes, which exempted everything done, or anything done by the Code Authority or by the mem-

bers of an industry; from prosecution under the Anti-Trust laws.

The argument, which I should like to have appear as a matter of record, is briefly that in view of that exemption, nothing having to do with what was done under the NRA could or should have any bearing upon this case.

It would be very similar to appealing to Mr. Lenci to ask him what was done in the Standard Sanitary case, and inasmuch as they may have done certain things there, then what they did here would appear to be right.

We therefore ask that those pages of the testimony be stricken.

Justice Stephens: Do you wish to be heard, Mr. Bromley?

Mr. Bromley: Well, I am not quite sure what his present ground is. If it is that we claim exemption in this lawsuit because of what the NRA provides, that wasn't the purpose at all. What I wanted to show was that under the NRA Code, providing as it did an exception to the application of the Sherman Act, it was, for a time, lawful to fix prices, and the manner in which prices were fixed there, and the extent to which terms and conditions and practices were regulated, were as broad, at least, as our price bulletins are.

As I remember that cross examination it was merely to show that there was nothing strange or unusual in
4839 our bulletin provisions because, under the NRA Code, when prices were regulated, they had the same kind of thing, just as they had later under the Coal Act, and just as they had in the General Electric case.

I was trying only to develop, by that cross examination, that point, that all of these bulletin provisions regulated the price and nothing else.

Justice Stephens: It seems to us that the motion to strike presents just the same question upon which we have previously ruled when objection was made to cross examination—and it is denied.

We may add that we do not make any comment as to what weight the reference to the NRA may have, as that is a different question. We were aware, of course, as you called to our attention at the time, that the NRA was ultimately held unconstitutional; and I have always been aware—and I suppose my brothers were too—that there was a provision in the statute for exemption from the Anti-Trust laws.

But I think the purpose of the testimony was as described by Mr. Bromley, and that that is not or was not improper

cross-examination, and my colleagues agree, and therefore the motion to strike is denied.

By Mr. Steffen:

Q. Were you a member of the body which formulated the rules under the NRA Code, Mr. Lenci?

4840 A. Yes.

Q. What position did you have? A. I was a member of the Code Authority.

Justice Jackson: You were what is called an industry member?

The Witness: Yes.

Justice Jackson: Of the Code Authority?

The Witness: Yes.

By Mr. Steffen:

Q. How many members were there, Mr. Lenci? A. There were thirteen; I remember that because I was the thirteenth appointment.

Q. And who were they, can you tell us? A. I can probably tell you most of them.

Justice Stephens: Speak a little louder, please.

The Witness: There was the United States Gypsum Company; the National Gypsum Company; Certain-teed; ourselves; either Newark Plaster or Kelley, whichever was in effect at that time—

By Mr. Steffen:

Q. (Interposing): That would have been Kelley, probably. A. Yes, Kelley; the American Cyanamid; Texas—

Q. (Interposing): Universal? A. Yes; and I think the Pacific Coast Portland Cement was a member.

Justice Stephens: Portland Cement?

4841 The Witness: Yes, the Pacific Coast Portland Cement; the Oakfield Gypsum Products Corporation; French & Company—

By Mr. Steffen:

Q. (Interposing): Who was French & Company? A. They were small manufacturers in Philadelphia.

Q. They were plaster manufacturers? A. Yes. There must have been a couple of others that I don't remember at the moment.

Q. Was the Cardiff Plaster Company a member? A. I am not sure.

Q. Do you know Mr. Sensibar? A. Yes, but I don't know whether he was active then or not.

Q. Who was the secretary of the committee? A. For the moment I can't remember. He was a Chicago man, not an industry man but he was a man picked for the job outside of the industry.

Q. How long did your group deliberate over the Code provisions? A. Well, as I recall it, probably one or two days.

Justice Jackson: After hearings; did you have hearings on them?

The Witness: I was just trying to remember. The reason I hesitate is that it was quite a long while before we got to where we decided that we wanted a Code or
4842 didn't want a Code. We were about a year later than anyone else in getting started.

Justice Jackson: You needed 90 percent of the industry, didn't you?

The Witness: I believe so, yes.

By Mr. Steffen:

Q. You had 90 per cent represented, I presume? A. Yes.

Q. You had practically all the gypsum board manufacturers, did you not? A. Yes, I believe so. I don't remember now just how long the deliberations took.

Justice Stephens: We will take the afternoon recess now.

(Whereupon, a five minute recess was taken after which the trial was resumed as follows:)

4843 Justice Stephens: Proceed, Mr. Steffen.

By Mr. Steffen:

Q. Did you attend many of the meetings, at which the Code for the Gypsum Industry was drafted? A. No, I don't think so.

Q. I think you told me during the recess that you attended some in the beginning, and some at the last, is that correct? A. Personally, I don't think I attended the first meeting.

Justice Stephens: Mr. Steffen, we think perhaps some time could be saved—we don't restrict you, if you wish to conduct an extended redirect examination on this topic the Court will of course permit you to do so—but we can say that perhaps in the interest of saving time, while we won't pass any final judgment on the weight of this NRA testimony, we do not attach any very great importance to it. We thought it was proper cross-examination and still do,

to indicate, or as tending to indicate, that the development of these bulletin practices was perhaps not a strange and unusual occurrence, happening all at once, but something in the nature of an evolution.

It tends to explain them in a way, and we thought therefore, and still do, that it was proper cross-examination.

But we are not treating the proceedings under the NRA as being any res adjudicata for this case, or any exemption or anything of that sort, and I don't think it is offered for that.

4844 As I say, you can go ahead and examine if you want to, but you needn't do so on the theory that we attach any very great importance to that aspect of the case.

Mr. Steffen: I simply wanted to throw as much mud on it as I could, your Honor. (Laughter.)

By Mr. Steffen:

Q. Let me ask you one or two questions, Mr. Lenci, further.

It is a fact, is it not, that most of the regulations that were promulgated as the Gypsum Code, had already appeared in the license bulletins? A. I haven't read the NRA Code for a long time. It is my recollection that that is substantially correct.

Q. For example, on page 4806, there is a question concerning sales on consignment. Mr. Bromley asked you:

"Q. And isn't it a fact, sir, that under the Code, if a member made a sale on consignment to a customer, it was considered to be a violation of his filed prices?"

Now there was provision, was there not, in the bulletins concerning sales on consignment? A. Yes.

Q. We showed you Government's Exhibit 38, page 112, which was promulgated in 1932, covering that. A. Yes.

Q. And the same would be true with regard to gifts by one gypsum manufacturer to a dealer in conjunction

4845 with a sale to the dealer? A. Yes.

Q. On page 4812 of the transcript there is a reference made to warehousing, and I think we have already called your attention to the fact that there was at that time a provision in the bulletins concerning warehousing—that is this same Government Exhibit 38, page 112—that covers that, is that not correct? A. Yes.

Q. At page 4820 of the transcript there was a question asked you similar to one asked you on page 4687, and I will read it to you:

"Now in connection with those questions, I would like to ask you now—did you understand that there was anything in your license contract, or in the bulletins, which provided that USG should raise or stabilize the prices of gypsum board?"

Your answers today, concerning the provision in the licenses as respects stabilizing, were to the effect that the licenses did provide for stabilizing prices, is that correct?

Mr. Bromley: He didn't say that at all.

Mr. Steffen: I am asking him if that is correct.

The Witness: The license, as I understand it, provided that the USG set the selling price.

By Mr. Steffen:

4846 Q. That is right. A. Yes.

Q. And thereby they would stabilize the price? A. Well, that is a conclusion you draw from that.

Q. Well, it would be a uniform price for the industry, would it not? A. Yes.

Justice Stephens: That is at a given time.

Mr. Steffen: At a given time, yes, your Honor.

By Mr. Steffen:

Q. The reason I asked you that question is that you answered Mr. Bromley's question with a "no". A. I think maybe I misunderstood Mr. Bromley, but I understood the question to be—was there an agreement to stabilize conditions in general by these licensees? How does the question read?

Q. I will read it to you:

"Now in connection with those questions, I would like to ask you now—did you understand that there was anything in your license contract, or in the bulletins, which provided that USG should raise or stabilize the prices of gypsum board?" A. I said "no" to that, didn't I?

Q. Yes, you said "no". A. There was nothing in there that they should raise the prices, they were to fix the price.

Q. It says "raise or stabilize" there. And if they
4847 were to fix the price, would not that have the effect of stabilizing price conditions? A. Naturally.

Q. So that your answer should be "yes" as respects that, shouldn't it? A. It is a double question.

Q. That is right. A. I would say "no" to one part of it and "yes" to the other.

Q. That is what I wanted you to say, if that wasn't the fact.

On page 4838, Mr. Lenci, this question was asked:

"Q. And what was your attitude during these years with respect to the Kelley-Structural relationship generally, if you can tell us?"

And you answered:

"A. We had a feeling right along that Kelley was giving Structural a very much larger distributors' discount than was permitted by the bulletins."

At that time, Mr. Lenci, was it your opinion that a patent holder could require control of the resale price by a distributor— A. (Interposing) At what time was that?

Q. I will have to get you the connection. It is Exhibit No. 440, and I will show you the exhibit.

4848 (The witness was handed a copy of Government's Exhibit No. 440 for examination.)

By Mr. Steffen:

Q. What is your answer now, Mr. Lenci? A. I had that understanding in my own mind until sometime in the early 30's. Whether it was before or after the date of this exhibit, I don't know, unless my memory can be refreshed in some way.

Q. You testified, I might say, at the criminal trial, at page 563 of the transcript, that it was sometime in 1933. Does that refresh your recollection? I will show you the transcript.

(The transcript of the criminal trial referred to was handed to the witness for examination.)

Mr. Bromley: What was that page?

Mr. Steffen: Pages 563 and 564, I think.

The Witness: Well, as I say, I believe it was early in the 1930's, it might, quite possibly, have been at that time.

By Mr. Steffen:

Q. In 1933? A. Yes.

Q. You will note that Government's Exhibit 440 is dated June 9, 1932. A. Yes.

4849 Q. So that you would say, would you, that at that time you expected that the licensor could control the sales and terms and conditions of sale, by Structural to its dealers? A. I believe so.

Q. On page 4846, Mr. Lenci, you testified that for a period your company sold the Structural Gypsum Company, is that correct? A. Yes.

Q. And your attention was called to the various practices which the Structural Gypsum Company had been engaged in, in its sales, and then this question was asked:

"Q. And they continued their sales practices and policies during that time just as they had existed prior thereto?"

And you answered: "A. That is right."

Is that correct?

A. Well, what comes ahead of that? I am not sure just what I am answering, all of it.

Q. I will show you your testimony beginning at page 4845, and carrying over to page 4846.

(The transcript referred to was handed to the witness for examination.)

The Witness: Yes, that was my answer.

By Mr. Steffen:

Q. What I want to get at is just what practices you had in mind. Did you have in mind, for example, that
4850 they continued the practice of having a dealer in their warehouse? A. I am just trying to find out what the practices are that you referred to.

Q. That is what I want to find out. A. It must have been somewhere prior to this.

Q. Can you answer as of the fact, did they continue to have a dealer in their warehouse? You remember that incident, don't you? A. No, they didn't have a dealer in their warehouse while they did business with us.

Q. And did they deliver directly to the job, to the contractors in Philadelphia, for example? A. No, I don't think we ever had any complaint as to that.

Q. And did they sell, to your knowledge, below bulletin prices to dealers? A. I think they did.

Q. In any amount, after you were selling to them? A. Yes.

Q. Did you make a complaint as to that? A. I didn't learn about it until long afterward.

Q. I see. You are not positive that they did undersell or cut the bulletin prices, are you? A. Yes, I think it is a matter of record in the criminal trial.

4851 Q. At the time that you were selling them, that they did so? A. I believe so, I think Mr. McCormick so testified.

Q. And had you known about it you would have made a complaint? A. I believe we would have, because they were in the same markets that we were in.

Q. But you would say that excepting for that one illustration, they have abided by the bulletin prices, while you were selling to them, as far as you know? A. His testimony was a general admission that they had done it in a number of cases.

Q. I don't wish to go into that. We are going to call Mr. McCormick as a witness. I would like to have your knowledge. A. As I say, I got that knowledge later, I didn't know it at the time, but I did find it out two or three years later.

Q. It is strictly hearsay, then. So far as you know—please answer this—they have followed the bulletin prices excepting for those statements that you say Mr. McCormick made at the criminal trial? A. So far as I know.

Q. And on page 4847 there is a question as to whether you ever refused to sell Structural at any time, and you answered "no", is that correct? A. That is correct.

4852 Q. And the next question was:

"Q. Did you ever threaten them that you would refuse to sell them?"

And you answered:

"A. No."

A. That is correct.

Q. If they had been selling board in the same markets that you were, at less than bulletin prices, would you have continued to sell them?

Mr. Bromley: I object to the question "at less than bulletin prices"—these people didn't get the bulletins. I think that assumes a fact not in evidence. They weren't licensees, they weren't entitled to the bulletins, and never got them.

Mr. Steffen: I will strike the word "bulletin".

By Mr. Steffen:

Q. If you had known that Structural was selling at prices lower than yours, would you have continued to sell them? A. I don't know, I couldn't tell you.

Q. You never had that come up? A. The one instance was the case of Stremble that we discussed quite a while ago, where Stremble was rebating.

Q. And Mr. Stremble was fired, was he not? A. Not at our request.

Q. No, but he was fired? A. Yes.

4853 Q. The same question was asked you on pages 4855 and 4856, with regard to the Connecticut Adamant Plaster Company, as follows:

"Q. Did you at that or any other time ever threaten to stop selling gypsum board to the Connecticut Adamant Plaster Company?"

And you answered:

"A. No."

Is that correct? A. That is correct.

Q. Did you have any knowledge that the Connecticut Adamant Plaster Company sold at prices lower than your prices, to dealers in the same territory where you were selling? A. No, I had no knowledge at all, because we were not selling in that territory.

Q. Did you have any arrangement with the Connecticut Adamant Plaster Company as to where they would sell? A. No.

Q. Did they sell in Bridgeport, for example? A. I don't know.

Q. Were you selling in Bridgeport? A. At that time I don't think we were. That is ten or twelve years back, and I don't remember.

Q. Did you discontinue sales to the Connecticut Adamant Plaster Company? A. They discontinued buying
4854 from us, we didn't stop selling them.

Q. And was there any discussion that you recall as to whether they might sell in Fairfield County, or Bridgeport? A. No.

Q. As you recall. A. There was no limitation on our part.

Q. Now on pages 4856, 4857 and 4858, the matter of commission men was brought up, and again you referred to your salesman, Mr. Parker, and also to Mr. Blanchfield.

On page 4858 Mr. Bromley asked you the broad question:

"Q. You now say, do you, that it was your understanding that no licensee had to discharge these commission men, and that their only obligation was to see to it that they did not rebate on the USG fixed prices by the device of splitting a part of their commission with the customer of the licensee?"

To which you answered that that was your understanding. A. Yes.

Q. I call your attention to Government's Exhibit 37, page 555, and I ask you whether that was in your mind at the time that you gave that answer? That is on page 555, Mr. Lenci, in the last sentence; particularly.

(The witness was handed a copy of Government's Exhibit No. 37 for examination.)

The Witness: What I am trying to remember is—
4855 this bulletin was in effect in 1936, and I am not sure whether this man Parker, whether this Parker episode, wasn't a few years later than that.

By Mr. Steffen:

Q. Well, this bulletin, in effect in 1936, continued to be in effect, did it not? A. Only until the next one came out.

Q. Unless the next one changed it? A. No, each bulletin entirely superseded the previous bulletin.

If you will look at page 543 of that exhibit you will see that at the top it reads, "This cancels Bulletin No. 5". Each one, as it came along, canceled in full the previous bulletin.

Q. You don't recall just when Mr. Parker was employed by you? A. No, I do not.

Q. This same bulletin, Government's Exhibit 37, page 555, appears also in Government's Exhibit 37 at page 535, which is dated February 24, 1937. So that during the period from February 22, 1936, until sometime after 1937, this bulletin was in effect? A. Yes, but what was the bulletin in effect prior to 1936?

Q. We can check that also. You don't have any
4856 recollection as to that? A. No, because they changed from time to time, and I am not sure of just the time that Parker was employed.

Q. Had Blanchfield been with you long? A. Blanchfield was with us for probably four years, four or five years.

Q. What years were they? A. Well, I am just making a guess at this, but I would say probably from 1935 to 1940, or somewhere about that time.

Q. I call your attention to the fact that this same bulletin, which I have called your attention to already, appeared in Government's Exhibit 37 at page 559, which was issued on September 16, 1935. So that the bulletin was in effect over a period of at least three or four years.

Justice Jackson: Is there a question?

By Mr. Steffen:

Q. May I ask this question. How was Mr. Blanchfield paid? A. Mr. Blanchfield was paid a substantial salary, and then a bonus for sales above a certain amount.

Q. At the end of the year? A. Yes. He had a fixed salary each month, and then if his commissions were running substantially above that, he could draw part of that as he went along.

Q. How was Mr. Parker paid when he was with you? A. Parker was with us only a couple of months, two or
4857 three months.

Q. How was he paid? A. Just a nominal salary, and commission.

Q. Practically a straight commission basis, then? A. Yes, practically.

Q. Does the industry draw a distinction between a man who is strictly on a commission basis, and one who is on a substantial salary with a bonus at stated intervals? A. I don't know what the practice is with the industry in general, but that was the way we felt about it.

Justice Stephens: What do you mean by that, that there was a difference?

The Witness: We would say that there was a great difference between a man who had a substantial salary and a bonus, and one who was purely a commission man with practically no salary.

By Mr. Steffen:

Q. So as you would construe this provision, it would not apply to a man who was on a straight salary plus bonus? A. No.

Q. At page 4863, Mr. Lenci, this matter of jobbers comes up again. The first question is:

"Q. You said that there came a time when USG, in its price bulletins, eliminated the jobber's discount, and fixed the price to jobbers at the same figure as the dealer's
4858 price, didn't you? A. Yes.

"Q. And you have told us, I believe, that you never knew of any understanding or agreement with USG, or anyone else, at any time, that this would be done? A. They did it on their own initiative, and notified us through the bulletins."

Do you remember that? A. Yes, that is correct.

Q. Now, this morning you read some of your testimony before the grand jury at which the matter of the jobbers being eliminated was taken up and discussed, and would you say, in the light of that testimony which you read this morning, that there was a time at which there was a discussion, and a substantial agreement, that jobbers were to be eliminated from the industry?

Mr. Bromley: I object to that question as assuming facts not in evidence. That is not a correct summary of his grand jury testimony at all.

Mr. Steffen: I didn't intend to summarize it, but I thought it would refresh Mr. Lenci's recollection.

Justice Stephens: Read the question.

(Thereupon, the pending question was read by the reporter.)

Justice Stephens: I don't think the question as-
4859 sumes to state what the grand jury testimony was; it simply refers to it, Mr. Bromley. So that objection is overruled.

By Mr. Steffen:

Q. Can you answer that, Mr. Lenci? A. As I tried to explain, when these matters like the matter of jobbers came up, we would express our views and our understanding, whatever it was at the time, and the USG took those into consideration and drew their own conclusions, and made up their own mind and issued the bulletins.

Q. That is true, but the bulletin had been issued in 1930, and then the jobbers had continued with some licensees, had they not? A. Yes, and after the 1930 bulletin these discussions as to jobbers came up, with the licensees complaining about what the companies were doing with jobbers, that is, continuing to sell them at a discount.

Q. And was there an occasion at which you licensees met, and at which Mr. Henning was present, at which he said, "We can close them out"? A. I don't remember that exact wording.

Q. Was there substantially that statement made by Mr. Henning? A. I don't remember that, I know it is in the grand jury minutes that I read this morning, but I honestly don't remember it at the present time.

4860 Q. That was your testimony before the grand jury. A. I know it was, yes.

Q. Now on page 4873, the question was asked you concerning whether distributors were to be regarded as jobbers, this question being put by Mr. Bromley:

"Q. Well, so far as the bulletins were concerned, Mr. Lenci, the only term ever used in them was 'jobbers', isn't that right?"

And you said: "A. Yes."

And then the next question was:

"Q. Neither the term 'broker', nor the term 'distributor', according to your best recollection, was ever used in a USG price bulletin, was it? A. I am very sure that the term 'broker' was never used, and I don't think the term 'distributor' was used, except in connection with 'manufacturing distributors'."

I want to show you now Government's Exhibit No. 430.

(Government's Exhibit No. 430 was handed to the witness for examination.)

By Mr. Steffen:

Q. You will notice the middle paragraph, Mr. Lenci, please? A. Yes, I see it.

Q. That is a reference to distributors, is it not? A. Yes.

4861 Q. As well as jobbers? A. Yes, jobbers and distributors.

Q. Putting them in substantially the same category? A. Yes.

Q. And Mr. Bromley's assumption in his question to you on page 4873, that the bulletins do not mention "distributors", would be incorrect? A. Yes.

Justice Jackson: Is this a bulletin, this exhibit?

Mr. Steffen: Yes.

By Mr. Steffen:

Q. There was some testimony, Mr. Lenci, on page 4894, which is not quite clear to me, having to do with Maftex. Do you remember having testified concerning that? A. Yes.

Q. Mr. Bromley asked you this question:

"Q. Now so far as you were concerned, it was the fact, wasn't it, that National could sell Maftex at any price it wanted to?"

And you said:

"A. Sure.

"Q. The thing that you objected to was their practice of selling it below their current market price in order, in that fashion, to effect an indirect rebate on the price of the gypsum board? A. That was my complaint."

4862 Now I cannot understand that, Mr. Lenci, because it seems to me to say, on the one hand, that you can sell Maftex at any price you want to, and on the other hand to say that you can't sell it at any price you want to, if you are selling it in conjunction with board because that would effect an indirect cut in price. How do you explain that? A. Well, the National Gypsum Company at that time was selling Maftex through that particular territory at about a certain price, I don't remember what the price was. But they suddenly made a very much lower price to this particular dealer in order to influence the sale of gypsum board.

Q. And you made a complaint about it? A. Yes.

Q. In other words, you were complaining that they should not be privileged to sell Maftex at a lower price if they were

going to thereby effect a reduction in the price of gypsum board, is that correct? A. That was my complaint.

Q. And the two statements simply won't stand up then, I mean they are inconsistent with each other. Your first answer was that they were privileged to sell Maftex at any price they wanted, and your second answer was that they were not privileged to sell it at any price they wanted to if—

A. (Interposing) Wait a minute. There is nothing
4863 that I know of that prevents them from selling Maftex at any price they want to; but, if they take that price and reduce it to a price much lower than they usually sell it at, in order to influence the sale of gypsum board, that is a separate question, and I think I answered it properly.

Q. And you make the complaint that if they do that it will be regarded as a cutting of the price of gypsum board? A. Yes.

Q. Now on page 4894 we come to the Structural sales again, and the fact that in 1932 Structural was reported to have made an arrangement whereby they had a dealer locate himself at Structural's plant. The testimony was as follows:

"Q. Well, let's see, Kelley had the permission of the licensors to sell a distributor at a discount only if the distributor were acting as a wholesaler and not a retailer, isn't that right?"

Q. Your answer was:

"A. That is true, yes."

Now, are you real sure that that is correct, Mr. Lenci? A. Well, they had the permission to sell the Structural Company as a manufacturing distributor, not as a retail dealer.

Q. That is right. A. At a discount.

Q. And you mean by that to say that USG, the licensor, had granted to Kelley authority to sell to Structural only if Structural sold at wholesale? A. As a manufactur-
4864 ing distributor, yes.

Q. That is, sold to dealers? A. Yes.

Q. If Structural sold to retailers, then your understanding is that that was contrary to the arrangement between the licensor and Kelley? A. Yes.

Q. That they were limited to one class of customer? A. Yes.

Q. Is that your understanding also with regard to the Connecticut Adamant Plaster Company, that they should only sell to dealers? A. I would say it would be the same thing.

Q. And the same would be true of Oakfield? A. Yes.

Q. That they might not sell to but one class, that is, to dealers? A. Yes.

Q. Do you know as a fact whether Connecticut Adamant has sold at retail? A. I don't know enough about their business to answer that.

Q. Now on page 4902, Mr. Lenci, another Structural situation was brought up. The question at the bottom of the page is:

"Q. That is something you said you brought up at
4865 the licensee meeting of December 13, 1932? A. That is right.

"Q. Now, when you said 'Kelley to straighten out at once', didn't you mean merely that Kelley was to find out whether, as a matter of fact, Structural had changed the character of its business to the extent indicated? A. Yes.

"Q. You didn't mean, did you, that Kelley was to straighten it out by coercing or compelling Structural to go out of the dealer business? A. We couldn't expect him to do that."

You testified a few moments ago—and this occurred by the way in 1932—that up until sometime in 1933 you had thought it was within the province of the licensor to see that his products were sold not only by licensees, but by distributors, at bulletin prices, and according to bulletin conditions. Would you care to change your testimony upon that point? A. Well, isn't there something in my testimony—something in what you just showed me a few moments ago, in one of those records—that shows I was enlightened sometime in 1932?

Q. 1933 was your testimony in the criminal trial. A. I know I made the statement that it was 1933 at that time, but it seems to me that someone cleared that up—

Justice Jackson: (Interposing) Didn't you say here a few minutes ago that it was in the early 30's, possibly in 1933?

4866 The Witness: Yes, but I think there is something else that is more definite in the record that was shown me a little while ago, but I was not asked about it, and so did not mention it. It showed that it was in 1932 that I found that out. I think it was in response to a question by Mr. Bromley.

Justice Stephens: You mean in the record in this case?

The Witness: Yes.

By Mr. Steffen:

Q. Can you say, Mr. Lenci, that in point of fact you did expect something to be done about the Structural situation? A. We expected that Kelley would check up and not continue what we thought he was doing, and that is, giving a commission to Structural and allowing them to do all these different things they were doing at that particular time.

Q. Your statement in Exhibit 479 was, "Kelley to straighten out at once". Did you not understand by that, that Kelley was to make sure that Structural was selling at proper prices? A. I think this had to do with the establishment of a dealer there.

Q. That is correct. A. Yes. We expected Kelley to see that the Structural Company did not become a dealer, a retail dealer.

Justice Stephens: We will take the afternoon recess at this time.

4867 (Thereupon, at 4:00 o'clock p. m., an adjournment was taken until 10:00 o'clock a. m., Tuesday, March 21, 1944.)

4868 IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA,

Plaintiff,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS,

Defendants.

Seventh Floor,
Internal Revenue Building,
Washington, D. C.,
Tuesday, March 21, 1944.

The above-entitled cause came on for further hearing at 10:00 o'clock a. m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

APPEARANCES:

(Same as heretofore noted.)

4871 Justice Stephens: We seem to have had a surplusage of "thats" in this case.

Page 5135, after the word "any" at the end of line 14, add the word "final".

I have one or two questions I would like to ask, that perhaps can be cleared up by further examination. These occurred to me while I was reading the transcript.

On page 5056, the question commencing in line 5:

"Q. I call your attention particularly, Mr. Lenci, to Exhibit 405, and the quotation of $17.50 per thousand, f. o. b. mill. That price, Mr. Lenci, was for the covered-edge board if and when you got into production, was it not? A. Yes.

"Q. I think you testified concerning that on pages 4671 to 4679 of the transcript.

"That price of $17.50, Mr. Lenci, was the same price as the price for No. 2 grade wallboard, was it not?"

Did the witness mean, by "No. 2 grade wallboard", seconds? If not, I would like to have that cleared up when he takes the witness stand. I didn't quite understand what he meant by that.

Then there were a number of questions I had in the afternoon session. Pages 5101 and 5102—not to take too much time or to put too much into the record, I call attention of counsel to the answer commencing at line 3 and ending at line 9, on page 5101; and on page 5102, to the answer commencing at line 8 and ending at line 10; on page 5105, to the answer, or that portion of the answer commencing at line 4 and ending at line 7.

4872

I am still somewhat puzzled as to the testimony on that subject. I wanted to ask the witness whether or not what he meant finally was that the result of the bulletins was to

make the price uniform but not the profit. He talks about a cut below the base price shown in the bulletins, at page 5101. His testimony isn't entirely clear to me yet.

Then in Exhibit 37, page 555, the provision with respect to commissions,—I wanted to ask: How does the mere selling through a commission salesman accomplish a rebate or an allowance? There were two provisions in these bulletins with respect to commissions. One had to do, in terms, with rebates; the one I am now referring to made merely a reference to selling through commission salesmen at all.

I want it explained how the mere selling through a commission salesman would accomplish a rebate or an allowance, unless he made some actual payment out of his commission over to the customer.

Then I would like to have my recollection refreshed in respect of page 5153, as to what Maftex is. I have forgotten.

Perhaps those matters can be brought out by the witness on further examination on redirect, or on cross-examination.

4873 Mr. Knuff: Your Honor, in connection with the correction made at line 21, page 5129, I have checked that with the National Industrial Recovery Act, and it should read "* * * and in effect under this Title," rather than "* * * and effective under this Title,".

Justice Stephens: It may be so corrected.

Mr. Bromley: Could I say at this time, so I am clear as to what is in Your Honor's mind, that there never was a time when both provisions were in a price bulletin. That is to say, in the early days there was this language which said that the licensor will regard the employment of a commission salesman as a violation of the license; and that was changed to make it say specifically that it was a rebate of commissions paid to the salesman.

Justice Jackson: Was it changed back again?

Mr. Bromley: No, the wording was changed.

Justice Jackson: I thought the witness' attention was called to a bulletin of 1937 which still contained that.

Mr. Bromley: That change was not made until 1939, that is right, sir.

Justice Jackson: I thought that condition existed from 1935 to 1937.

Mr. Steffen: That is our understanding.

Justice Jackson: That is what I got from the evidence yesterday, but of course those things should speak

4874 for themselves, you have them here.

Mr. Bromley: I have looked at the bulletins, and I am confident that the provision which had the language about employing commission salesmen continued right up to 1939, and then it was changed to prohibit the splitting of a salesman's commission, it was clarified.

Mr. Steffen: I don't wish to be bound exactly by Mr. Bromley's statement. I think the record will show. But certainly up until 1939, the provision that we speak of obtained.

Justice Jackson: Is that correct, Mr. Bromley?

Mr. Bromley: That is right.

Justice Jackson: And subsequent to 1939, it was just the splitting of commission?

Mr. Bromley: Yes, Your Honor.

Justice Jackson: That is right, is it, Mr. Steffen?

Mr. Steffen: We don't concede that, Your Honor.

Justice Jackson: But you do agree that up until 1939, there was a prohibition against employing salesmen on a commission basis?

Mr. Steffen: Yes, Your Honor, we insist upon that.

Mr. Bromley: Of course, my contention is that the earlier wording, which lasted up until 1939, was merely a prohibition against splitting commissions, whatever it said, and it was so understood in the industry that that was the

4875 intent and purpose of it. But there was a change in the expression of it in 1939.

Mr. Steffen: It might say on that that our contention is the reverse, and the effect was actually to eliminate commission salesmen.

Justice Stephens: I should think that ought to be cleared up, as to what the understanding in the industry was, if it isn't already cleared up in the record.

Take the witness stand, Mr. Lenci.

Thereupon, GEORGE N. LENCI the witness on the stand at the time of adjournment, resumed the stand and testified further as follows:

Redirect Examination (resumed)

Mr. Steffen: I will try, Your Honor, to clear up the matters that you spoke of just now.

By Mr. Steffen:

Q. On page 5153, Mr. Lenci, there was a reference to Maftex. A. Yes.

Q. National, I believe, was selling Maftex in conjunction with board, and there was a complaint made that they were reducing the price on Maftex; do you remember that? A. That is right.

Q. What was Maftex? A. Maftex is a wallboard
4876 made, as I understand, of a shredded wood fiber product, similar to Celotex and boards of that type. It is what is known in the trade as a fiber board or an insulation board.

Justice Stephens: Thank you, that refreshes my recollection. I remember you testified to that before.

The Witness: It is not a gypsum product.

By Mr. Steffen:

Q. Maftex would not be the type of thing that could be shipped in a mixed car, is that correct? A. No, they would not be made at the same plants.

Q. It wouldn't be regarded as a gypsum product? A. Not at all.

Q. Now I would like to show you, Mr. Lenci, Exhibit 405.

(Exhibit No. 405 was handed to the witness.)

By Mr. Steffen:

Q. You testified on page 5056 of the record concerning the No. 2 grade wallboard as being sold at a price of $17.50 per thousand feet. A. Yes.

Q. And I think the Presiding Justice would like to know what the difference is between No. 2 grade wallboard and seconds, or what the difference was at that time? A.

Well, the No. 2 grade was a board which was not
4877 strictly up to the standard of a first-grade board as to exact measurements, exact quality of the paper, and certain details of that kind. It didn't affect the structural qualities of the board at all, but it was not quite first-class, so it was known as a No. 2 board.

Justice Stephens: It differed from seconds, then, as I remember your previous testimony, in that the seconds did come up to all specifications so far as measurements were concerned, but might have some slight imperfections which couldn't pass inspection; is that right?

The Witness: No, that is the No. 2 board. You are describing the No. 2 board. It was deliberately made as a slightly cheaper board.

The seconds were boards which were not up to quality, not through intention but through defects which were not intentional. And they were put out as seconds.

Justice Stephens: That is what I had in mind myself—perhaps I didn't express myself clearly—that the No. 2 grade was intentionally made.

The Witness: That is correct.

Justice Stephens: At a little less than the requirements for No. 1.

The Witness: That is right.

Justice Stephens: But seconds were accidentally imperfect.

4878 The Witness: That is correct.

By Mr. Steffen:

Q. The No. 2 grade sold in competition most clearly with the open-edge board at that time? A. Before the granting of the 1929 license, you mean?

Q. That is right. A. Yes.

Q. Seconds, I think you testified, are no longer on the market? A. That is correct.

Q. They are cut up into plasterboards or into odd sizes? A. If there are any, they are cut up into smaller sizes.

Q. And sold in that fashion? A. Yes.

Justice Stephens: How was it that the open-edge and the No. 2 of the closed-edge sold at approximately the same price or competed with each other, since one was a closed-edge and the other an open-edge board?

The Witness: The No. 2 board was made by the companies who were making closed-edge board, and that was put out to sell at a lower price than their standard board in order to meet the competition of the companies who were deliberately making only open-edge board.

4879 Justice Stephens: I see.

By Mr. Steffen:

Q. Now there were some questions that the Presiding Justice had concerning your testimony on pages 5101, 5102 and 5105. Do you recall, Mr. Lenci, that we were discussing the situation where you were given a $13 base price? A. Yes.

Q. And the testimony had to do with the other matters, such as billing weights and sizes of shipments and trucking areas, and so on, which I think you testified were prescribed in order to make your company and the other licensees competitive with each other; is that right? A. Yes.

Q. And on page 5105, you gave an illustration. I will read it to you to get your memory refreshed. It begins at line 21 on page 5104:

"The Witness: Mr. Steffen started to say, 'Let's take an illustration'."—do you remember that? A. Yes.

Q. (Continuing). "Our plant is in Wheatland in Upper New York State. When we ship to Washington, our freight is roughly $5 per thousand. The United States Gypsum Company has a plant in Philadelphia. Their rate to Washington, we will say, is $3 per thousand. They take their mill price and add $3 per thousand, which
4880 would make a price down here of $16. Now, we have got to ship and sell to the customer at that price, we can't get $2 a thousand more because our plant is too far away. So in order to be competitive, we have to cut our price $2 to meet that circumstance, and the only place that can come from is out of what is left at the mill."

Do you remember that? A. Yes.

Q. Now the Presiding Justice's question is whether the effect of that is to make a uniform price to the dealer, but thereby to cut your profit in selling in Washington. Is that correct? A. That is correct.

Justice Stephens: In other words, what you mean by being made competitive, and what you mean by the necessity of being made competitive, is that you can't sell in the market unless you can sell, at a particular destination, at the same price that other manufacturers sell at?

The Witness: That is correct.

Justice Stephens: And in order that the price may be the same, these various adjustments and bulletin arrangements were made; but the particular manufacturer, if he were located at a disadvantageous distance—now that we are talking in terms of freight rates—has to meet that by taking a cut within his own manufacturing costs?

The Witness: That is correct.

4881 Justice Stephens: I see. I wasn't quite sure about that.

The Witness: What I was trying to explain was that these bulletins permitted us to go below the base price in order to allow us to meet competition at the destination.

Justice Stephens: What puzzled me was the use of the phrase "cut below the base price". I had it in my mind that the base price was a fixed price. What you meant was that although that was the price on which you commenced figuring, in order to get the destination price, nevertheless

you, in order to reach that destination price in competition with other manufacturers, had, in some situations, to take actually less profit than you otherwise would; that is, you had to take it out of your manufacturing costs?

The Witness: That is correct. We called it a freight absorption, and the amount we absorbed out of the freight would come out of your net price at the mill.

Justice Stephens: Thank you.

By Mr. Steffen:

Q. And the freight absorption is going to be different for each manufacturer shipping into a given territory? A. That is correct.

Q. The basing point system, by providing that you will use a fixed mill price at a given mill, plus freight from that mill to the destination, operates to make a uni-
4882 form price at destination, does it not, for all licensees? A. It has that effect, yes.

Q. And that may not have much relation to the profit of a particular mill selling in that territory, is that correct? A. It has a great effect on the profit.

Q. I think you are right on that. What I mean to say is that the profit will vary with different manufacturers shipping into that territory? A. It may vary or it may disappear entirely.

Justice Stephens: That is, the profit may vary, assuming that their manufacturing costs are relatively the same?

The Witness: Yes.

Justice Stephens: I suppose, actually, manufacturing costs do vary to some extent from plant to plant, depending upon efficiency of methods?

The Witness: Naturally.

By Mr. Steffen:

Q. The licensee who happens to be near the market,—as in this case USG, at Philadelphia, being closer to Washington than your company,—would have an advantage, so far as profit is concerned? A. The USG company would have the advantage, that is correct.

Q. And, conversely, if they were selling closer to
4883 your mill, you would have an advantage so far as profit is concerned? A. Yes.

Q. But so far as the customer is concerned, he pays a uniform price? A. Yes. It gives him the option of buying from a number of people instead of just the one that is in the market.

Q. But always at the same price? A. Yes.

Mr. Steffen: Your Honor asked concerning Exhibit 37 at page 555.

I would like to have Mr. Lenci look at that exhibit.

(Exhibit No. 37 handed to the witness.)

By Mr. Steffen:

Q. Will you look, Mr. Lenci, at the last paragraph, the last full paragraph on page 555? A. Yes, sir.

Q. This happens to be the bulletin issued, I think, on February 22, 1936. We have other bulletins which read the same way, Mr. Lenci.

Now I would like to ask you one question, if you have completed reading that, Mr. Lenci. A. Yes.

Q. The question is raised as to selling through
4884 commission men, and I think you testified that there was a danger, in selling through commission men, that a commission man might share or split his commissions with the purchaser? A. That is correct.

Q. If that were done wrongfully, that would constitute a rebate or a cut in price? A. Yes.

Q. Now, the Presiding Justice asked the perfectly obvious and reasonable question: If the commission man is honest, then there would be no rebate to the customer, would there? A. No, that is correct.

Justice Stephens: Perhaps the record ought to show—I am sure you didn't intend to misquote me—that I didn't ask the question whether or not there would be a rebate if the commission man was honest. What I asked was how the mere selling through a commission man, as such, would accomplish a rebate.

Mr. Steffen: Well, I perhaps jumped to a conclusion there, Your Honor.

By Mr. Steffen:

Q. Could you answer the Presiding Justice's question, Mr. Lenci? That is, how does the mere selling through a commission salesman, or how could the mere selling through a commission salesman, accomplish a re-
4885 bate? A. I don't think that it could. I never felt that this paragraph was a correct thing to be in the bulletin.

Q. Well, that is another matter. A. That, we had nothing to do with.

Mr. Steffen: Does the Court have any further questions?

Justice Stephens: No, thank you.

By Mr. Steffen:

Q. Mr. Lenci, at page 4911 of the transcript, this matter of the sale of board in conjunction with plaster was brought up again by Mr. Bromley, and I will read you, in order to refresh your recollection, the two or three questions asked:

"Q. Now, in connection with these Exhibits 489 to 501," —and may he be shown those exhibits, please?

(Exhibits 489 to 501 handed to the witness.)

By Mr. Steffen:

Q. (Continuing) —"Mr. Lenci, you understood that USG was not attempting to fix or control your plaster prices, didn't you? A. Yes, sir.

"Q. And you at all times felt perfectly free to charge for plaster any price that you saw fit, didn't you?"

And your answer was: "A. Yes."

Exhibits 489 to 501 have to do with complaints 4886 against your company? A. Yes.

Q. And the complaint is that you may have been selling plaster below the prevailing prices, to influence the sale of board?

Mr. Bromley: I don't think that that is a correct summary of the complaint at all. It is just the reverse, that you were cutting the board price by cutting the plaster price.

By Mr. Steffen:

Q. Will you state what the complaint was, Mr. Lenci? A. Well, Exhibit 489, the last paragraph of the Board Survey letter reads:

"Please advise in detail as to your sales of patented board to this firm, and specifically advise us of any donations or credits made in conjunction with your sales of said board."

Q. I see.

You construed that as an inquiry as to whether or not you were selling or giving away other articles in conjunction with the sale of board? A. Yes.

Justice Stephens: What are those other exhibit numbers?

Mr. Steffen: They are 489 to 501, I believe, Your Honor.

Justice Stephens: Thank you.

4887 By Mr. Steffen:

Q. In general, Mr. Lenci, these complaints have to do with the prices at which you were selling plaster, although as Mr. Bromley points out they may also have had to do with the prices at which you were selling board?

Mr. Bromley: I object to that as assuming facts not in evidence and calling for a conclusion. The documents are in writing, and I contend they show just the opposite.

Justice Stephens: Let the witness state what the nature of the complaints is, if they need interpretation. They speak for themselves, they are all before us in evidence, but if you want to get the witness' understanding of them for the purpose of redirect examination, you may ask for that.

By Mr. Steffen:

Q. Will you state what your understanding was, Mr. Lenci, of these other exhibits? You have spoken regarding Exhibit 489. A. Well, take Exhibit No. 500, for instance. The first paragraph of that explains itself very clearly. That is a letter from the Board Survey Company.

Q. That would refer to a reduction in the price of board by granting allowances on purchases of other commodities, including plaster? A. That is their inquiry, yes.

4888 Q. What I want to get at, Mr. Lenci, is: What was your practice in selling plaster? Did you have a price list? A. We had no published price list, no.

Q. When you say that, you speak as of what time? A. At any time.

Q. But you had instructions to your salesmen, though? A. We had instructions to our salesmen, and they were told to sell at certain prices, but we were always free, at any time, to meet whatever condition we found existing in whatever territory we were selling.

Q. There was such a thing as a prevailing price or a general price in your territory, during these ten years? A. To a certain extent. It was always flexible.

Q. Who were the principal sellers in your area? A. Well, naturally, the United States Gypsum Company and the National Gypsum Company. Those were the two largest companies operating in that area.

Q. Would you know about what prices they were selling at? A. Naturally. Our salesmen were in contact with our customers at all times, and they kept us very well informed.

Q. Did that influence you in your instructions to your salesmen as to what prices they should get? A. Surely. We wanted to get as much for our product as we could.

4889 Q. And you would be influenced by the USG price in determining what you could get, is that right? A. We would have to be, it would be the condition of the market. We couldn't get more, and we naturally wouldn't want to sell for any less.

Q. Now, I think you testified yesterday concerning sales to contractors. You stated that your company made no sales of board to contractors. Do you sell plaster to contractors? A. No.

Q. You sell strictly through dealers? A. Yes.

Q. And in selling through dealers, does your salesman occasionally help the dealer in talking to a contractor? A. Certainly.

Q. And the dealer's prices are in sharp competition, are they not, in sales to contractors? A. We have always made it a principle not to interfere with the dealer's prices or obtain a price from a dealer and take it to a contractor. We don't feel that that is the business of a manufacturer, it leads to trouble all the time. We like to bring the contractor and the dealer in contact, bring the contractor into contact with a friendly dealer, but as to what the final sales price is, we don't like to get into that at all.

4890 Q. Occasionally, are you approached by a dealer with the proposition that if you will help him out a little on your plaster price, he may be able to sell both board and plaster to contractors? A. No, they don't seem to connect the two.

Q. Well, many contractors buy both board and plaster, do they not? A. It all depends on where you are doing business. In most of the larger cities, they don't; and in the smaller towns, you are not so much interested in the contractor as you are in the regular yard business, as we call it. In other words, in the small town you are selling to the dealer all the time, and he, in turn, retails it to whatever contractor happens to need it. In the larger cities the jobs are more or less outstanding and, as I explained yesterday, they are very apt to be split between a plastering contract and a lathing contract.

Q. That split between your lathing contractor and your plastering contractor is after the main job has been let to the principal contractor? A. Yes, it is let to a general contractor; and then the general contractor lets to a

plastering contractor, and the plastering contractor is very apt to sublet the lathing part to a lathing specialist.

Q. Isn't it the practice for the general contractor, 4891 before putting in his bid, to get figures from his subcontractors? A. It all depends on what sort of a contractor he is. If he is a first-class, established concern, and knows what they are doing, they do their own estimating. If he is more or less of a broker, he will get a collection of sub-bids from everybody he can get hold of.

Q. There are a number of chiselers, aren't there, in the contracting business? A. Yes.

Justice Jackson: That is in every business, I think, too. (Laughter).

By Mr. Steffen:

Q. And they put a considerable amount of pressure upon your dealers, isn't that correct? A. Yes, I suppose they do.

Q. And they would like to get as good a price on their plaster or their board as possible? A. Or anything, yes.

Q. And prior to 1928 or 1929, or during 1928 and 1929, you were perfectly free to make any concession on your plaster price that you saw fit, if it would influence the sale of board, were you not? A. We would have been, yes.

Q. And as you have testified, you have no pub- 4892 lished price list. You would tell your salesmen what to shoot at, is that right? A. Yes.

Q. And in dealing with a dealer, they may get such price for their plaster as they can? A. Yes.

Q. And in quoting their price, they might be influenced somewhat by the fact that they would also sell board to the dealer, might they not? A. They might have been affected that way, yes.

Q. Now in view of those complaints that you have looked at, Exhibits 489 to 501, and the bulletin which is Government's Exhibit 37, at page 531, which you read yesterday, in regard to rebates, isn't it true, Mr. Lenci, that you are no longer as free as you formerly were to change the prices on your plaster or to reduce the price on plaster, or other related commodities, when making sale of board and plaster?

Mr. Bromley: I object to that as incompetent because calling for a conclusion. It seems to me all these questions overlook the fact entirely that before the license agreement, there wouldn't be any necessity to cut the price of plaster in order to influence the sale of board, because the price

of board wasn't fixed before the license agreement; and, therefore, this kind of a question, as to whether he was freer before or after, not only misinterprets the
4893 facts but calls for a conclusion which the Court should make, as to whether, if there was any restraint, it was illegal or not.

Mr. Steffen: I will say to that, that I would like to develop by the witness that in selling prior to 1929, he could modify either his board price or his plaster price as he saw fit. It is true that the board price wasn't fixed. But for business reasons, he might have decided to keep his board price fairly stable and to shade his plaster price, or vice versa.

Justice Stephens: We think the question is not objectionable, and the objection is overruled.

Mr. Steffen: Will you please read the question, Mr. Reporter?

(The pending question was read by the reporter.)

The Witness: Well, I don't know how you can draw the line, just where that line would come, as to how far you can make a cut on your plaster price before it becomes an infringement—not an infringement, but a breach of the price bulletins on board.

Justice Stephens: Read the whole answer. I missed one of his words.

(The answer was read by the reporter.)

By Mr. Steffen:

Q. But you feel that there is a line somewhere, where it would become a rebate, and where, thereafter, you
4894 would not be privileged to make a cut in your plaster price? A. But I don't know where that would be.

Justice Stephens: Wouldn't it be where the reduction in the price of plaster was of an appreciable or substantial character as distinguished from a minor character?

The Witness: Naturally, yes.

Justice Stephens: In other words, you can't fix the line to a cent, but you could approximate it in that manner, I suppose.

The Witness: Yes, but you couldn't say in so many dollars, here in the court room, where that line would be.

Justice Jackson: You couldn't, either, have it as what is sometimes called a "loss leader", could you, where you would actually lose money on your plaster to sell board?

The Witness: No, you couldn't afford to do that, because it would affect too much of your plaster business, because whenever you make a cut on plaster it not only applies to that job but to all other business in that territory.

Justice Stephens: You would not only have to sell at that price to that buyer, but to all other buyers in the territory?

The Witness: Yes.

By Mr. Steffen:

Q. And your other buyers find out very quickly
4895 if there is a cut, do they not? A. They do.

Q. I want to now take you to page 4913, Mr. Lenci, in connection with Exhibit 502.

That refers to your wire in connection with Mr. Lee Story? A. Yes.

Q. Your testimony at lines 8 to 13 of page 4913 indicates that you should have softened that wire somewhat, and made it read that Kelley must cease giving Lee Story a jobber's discount, rather than that he should be eliminated? A. That is correct.

Q. Do you object to the word "eliminated"? A. I do, yes. When you write a telegram like this, you are very apt to be brief and much more to the point than good usage demands.

Q. But the telegram is substantially correct, isn't it? A. The telegram is correct, and would be understood both by us and by the recipient.

Q. I would now like to refer to your testimony, Mr. Lenci, on page 4947, in regard to the sales by Structural. You were there asked this question:

"Q. Now, the nature of that complaint, based on that evidence of what Structural was doing, would be a
4896 charge against your company that your company cut the price to Structural, wouldn't it?"

Do you get the reference? A. Yes.

Q. And your answer was: "A. The inference would be that we were giving Structural a larger manufacturing distributor's discount than we should have.

"Q. And based upon your experience, you knew that Structural's activities might raise that inference as against your company? A. That is right."

That testimony gives me the impression—and I think it might give a reader the impression—that you were disturbed about what some other licensee might think concerning your sales to Structural; is that correct? A. Well,

what led up to that inquiry? There was something ahead of that, wasn't there?

Q. That is right. If you would like to read your testimony beginning on page 4945, you can get the connection.

(Transcript handed to the witness.)

By Mr. Steffen:

Q. That had to do with a telephone conversation with Mr. Bartlett of the USG, did it not? A. That is right.

4897 Q. And following that telephone conversation, you called up Mr. McCormick of the Structural Company? A. Yes.

Q. And you had a conversation with Mr. McCormick? A. Yes.

Q. And thereafter, you talked to Mr. Bartlett concerning that matter? I think you testified as to that. A. I believe so, yes.

Q. Now what I am getting at is this, Mr. Lenci: Your testimony there on page 4947 would carry the impression that you were interested in what other licensees might think concerning your prices to Structural, whether you were cutting the price to Structural or not. Is that not correct? A. What I was interested in was more or less of a complaint made by the licensor that we were cutting the price to Structural.

Q. And that was the reason that you called up McCormick? A. Yes.

Q. It wasn't necessary for you to call up McCormick if you were merely interested in the price at which you were selling McCormick, was it? A. That is probably true, but naturally I was getting more information for myself.

Q. And you reported that back to Mr. Bartlett? A. Yes.

4898 Q. It is true, Mr. Lenci, that all you had to do in order to find out whether there was a price cut was to look at your own ledgers to determine at what price you were selling to Structural; isn't that right? A. That is quite true, but at the same time, we were selling in Philadelphia ourselves, and what I was interested in was to find out whether a company we were selling to was underselling us in one of our territories with our own material.

Q. And that would have a bearing on whether you continued to sell to Structural, would it? A. Yes.

Mr. Steffen: I have lost a reference, Your Honor. If

you would like to take the 11 o'clock recess at this time, it might be convenient.

Justice Stephens: Very well.

(Whereupon, a short recess was taken, after which the trial was resumed as follows:)

4899 Justice Stephens: Proceed, gentlemen.

Mr. Johnston: If the Court please, may I suggest that we are having difficulties down at this end in hearing both counsel and the witness. I appreciate that we are entering the eleventh round of this match, and both counsel and the witness are, no doubt, considerably fatigued, but if they could raise their voices a little louder, so we could hear them, we would appreciate it.

Justice Stephens: I am sure they will be glad to comply with your request.

By Mr. Steffen:

Q. I would now like to take you, Mr. Lenci, to page 4951 of your testimony, having to do with metallized board, and your signing of the metallized board license.

Mr. Bromley asked you this question:

"Q. And did you have any understanding or arrangement or agreement with USG that you would observe those prices prior to the time that you got into production?"

And your answer was:

"A. No."

Do you recall that? A. Yes.

Q. It is true, is it not, that you could not buy board from National until such time as you signed the
4900 license agreement, buy it at a discount, I mean? A. I believe it was.

Justice Stephens: It was what, it was possible or not possible?

The Witness: It was impossible to buy from National until we signed the license, impossible to buy at a discount.

By Mr. Steffen:

Q. I show you Government Exhibit 548 in that connection.

(Government's Exhibit No. 548 was handed to the witness for examination.)

By Mr. Steffen:

Q. I believe it is the last sentence on the second page, to which I wish you to refer. A. Yes.

Q. And when you signed the agreement, the license agreement, for metallized board, did you understand from that, that you were to follow the prices for metallized board established by USG? A. Not until we made board ourselves.

Q. And in that interim did you receive prices, do you remember now, from USG? A. I don't think we did, I am quite sure we didn't.

Q. You testified earlier that you couldn't remember. A. I don't think we did. I have gone over that in my mind, and I don't think we received any bulletins until we signed the license agreement. The reason I say that is
4901 because I remember when we did get them we got quite a group, as I remember it.

Q. During this time when you were buying from National at a discount, you would receive an invoice from National concerning the purchase, would you not? A. Yes.

Q. And that invoice would be at the dealer price, would it not, minus your discount? A. Yes.

Q. And did you also inquire of National, or did you receive from National, information concerning the prices at which they were selling board, metallized board? A. I don't think we got that from National, but from our own men, because it was a matter of common knowledge in the trade what the board was selling for.

Q. It was a stable price? A. Yes.

Q. And you could get that from your salesmen inquiring from dealers, or trade information? A. Yes.

Q. And you sold, during that period, at the same prices as National did? A. I don't recall whether we did or not, but I presume we did.

Q. That would be your best recollection, that you
4902 did? A. Yes.

Q. Now on page 4952, Mr. Lenci, there is a reference to trucking companies, and you were asked this question:

"Q. Now there was nothing in the bulletins, as you understood them, was there, Mr. Lenci, which had any relationship to any requirement that licensees must hire trucks from trucking companies?"

And your answer was:

"A. No."

The next question was:

"Q. And the only provision about hiring trucks, as you understood those bulletins, was the provision contained in the sixth line of the last paragraph on page 531, under the heading 'Rebates and Allowances', which referred to an

indirect price cut or rebate by means of the device of hiring customers' trucks?"

And to that you said:

"A. That is right."

A. Yes.

Q. Your attention was not called at that time to Government's Exhibit 38, page 112, and I would like to show that to you now.

(Government's Exhibit No. 38 was handed to the witness for examination.)

By Mr. Steffen:

4903 Q. This was a bulletin issued in 1932. The portion to which I wish to call your attention is the first paragraph on page 112, Exhibit 38. A. Yes.

Mr. Bromley: What is the date, please?

Mr. Steffen: June 30, 1932.

By Mr. Steffen:

Q. That paragraph would provide, you so understand, I take it, that hiring or using trucking services of a customer would be regarded by the licensor as a rebate? A. My interpretation of that is a different matter.

Q. What is your interpretation? A. Just to clear it up so you will understand what my understanding of it was, I will give this illustration.

Suppose we were selling in a market where there was no provision for trucking, in other words, trucking was only provided for in larger cities. When we sold to the country at large it was not the practice to make truckload deliveries. We sold f.o.b. cars at destination in that event.

This paragraph has to do with a manufacturer going to a dealer and saying, "If you will buy from me in your city, we will give you an allowance so that you can unload your trucks"—which would be a cash rebate. For instance—

Q. (Interposing) If it were a proper allowance, would it be a rebate?

4904 Mr. Bromley: May he finish his answer?

Mr. Steffen: Certainly.

The Witness: For instance, we have been using Washington as an example, a great many times. Washington is not a truckload market. If we sold a carload to a customer in Washington, and to influence him we said, "You pay us our scheduled price in Washington, but we will give you $1.50 a ton so that you can unload the stuff without expense

to you"; that would be a cash rebate. And it was perhaps situations like that which this paragraph, I believe, was intended to cover.

By Mr. Steffen:

Q. As a matter of fact, Mr. Lenci, does the industry, in making deliveries in trucking areas, employ the dealer's truck? A. No.

Q. Do they ever do that? A. I don't know whether they ever did or not, but it is a common practice for each company to have a regular arrangement with some established trucking contractor who has a number of trucks and can always be called upon to give proper service.

Q. Well, as I visualize it there are three ways by which you can deliver by truck: by your own trucks, or you can hire an independent truck, or you can use the
4905 customer's truck? A. Yes.

Q. And the practice is for the licensee to use his own trucks or to engage an independent trucker—but do you ever engage the dealer's trucks to haul to the dealer's place of business in a proper trucking area? A. We never have, and I don't think it has been the general practice on the part of anybody to do that.

Q. Why not? A. Well, the dealer's trucks are usually handling his business, and not our business.

Q. Was there any discussion that you recall concerning the possibility that if you used the dealers' trucks, that the licensees might allow the dealer too large an amount, and that therefore it might constitute an indirect rebate? A. That I believe is covered in one of the bulletins.

Q. And what is your understanding about it? A. That is in one of those paragraphs on Allowances.

Q. That is, you understand that to mean that hiring a customer's truck will constitute an indirect rebate or allowance, is that your understanding? A. I wouldn't want to answer that because we never did it. I don't want to suppose what the other person had in mind.

Q. You have been in the industry for many years, and I simply wanted to get your understanding as to why the industry does not ever hire the dealers' trucks in
4906 making shipments—and you just stated, as I understand it, that you thought it was covered in some bulletin.

Mr. Bromley: I object to that question as assuming facts not in evidence. He hasn't said that the industry never hired a dealer's truck.

By Mr. Steffen:

Q. Let me ask you this. Does the industry to your knowledge hire dealers' trucks in making deliveries to dealers? A. My answer would be not as a general thing or not in, probably, 99 per cent of the cases, but I wouldn't want to say that it was never done.

Q. Has your company ever done that? A. No, we never have.

Q. Do you know of any other company that has ever done that? A. I do not know.

Q. My question is do you know of any licensor or licensee which has delivered to dealers by hiring dealers' trucks?

Mr. Bromley: He has answered that and said he didn't know. I object to that as repetitious.

The Witness: I can't answer that.

By Mr. Steffen:

Q. You don't know of any instance? A. No.

4907. Q. You said a minute ago that you thought it was covered by some provision in the bulletins, and would this Exhibit 38, page 112, apply to that situation and make it constitute a rebate, or what the licensor calls a rebate, if the licensee, under any circumstances, engaged a dealer's truck to haul to the dealer?

Mr. Bromley: I object to that as calling for a conclusion. He said he never heard of the practice, and that he never did it himself. How can he interpret this clause?

Mr. Steffen: I don't want to get his construction of the clause, your Honor, so much as I want to get his understanding, and he said that he did understand, that he thought it was covered by some provision in the bulletins, and I was trying to localize it to this particular one, if possible.

Justice Jackson: I thought the witness had described what he thought this particular thing was, and that it meant trucking from the freight yard to the dealer's yard—isn't that right?

The Witness: Yes.

Justice Jackson: That is your understanding of this particular exhibit?

The Witness: Yes, of this paragraph.

By Mr. Steffen:

Q. Let me show you Government's Exhibit 37, and call your attention to page 531.

4908 (Government's Exhibit No. 37 was handed to the witness for examination.)

By Mr. Steffen:

Q. There is a reference in the middle of that paragraph, Mr. Lenci, to the phrase "by hiring customers' trucks". A. Yes.

Q. Is that the provision that you had in mind? A. Yes.

Q. And your understanding is what concerning that? A. My understanding is that the licensor felt that if the licensees hired a truck from a customer, in a trucking area, that that might be construed as being a cash rebate.

Q. I think that is correct.

You stated just a minute ago, Mr. Lenci, that Washington is not a truckload area, or a truckload market. By that you meant what—just to clear the record? A. By reference to these bulletins you will see that there are certain trucking areas set up, and those are principally around the points where mills are located. Now there is no mill located in Washington. Consequently, Washington is not a trucking area.

Q. And that means that you sell in Washington only in carload lots? A. In carload lots, f.o.b. cars Washington.

Q. It would be possible to sell in less than carload
4909 lots, I suppose, charging the less-than-carload-lot freight rate? A. Theoretically it would be possible, but not from a business point of view.

Q. Because those rates are so high that nobody would buy? A. Nobody would buy at that price, that is right.

Q. Now, Mr. Lenci, we will take you to page 4956 of your testimony, again having to do with sales of plaster and unpatented products. Mr. Bromley asked you concerning that, asking this question:

"Q. And so far as you know were there ever any Board Survey complaints or investigations which had to do with the prices of plaster or other unpatented gypsum products?"

And your answer to that was:

"A. No."

Do you remember that reference, Mr. Lenci? A. Yes.

Q. You have read, this morning, Government's Exhibits 489 to 501? A. Yes.

Q. And would you say that they had to do with sales of plaster, in conjunction with sales of board? A. They had to do with the sale of board, and the inquiry was as to

whether we had influenced those sales by unduly reducing the price of other commodities.

4910 Q. Including plaster? A. Yes.

Q. And therefore your answer was too broad here, is that not true? A. No, I don't think so. Their inquiry was as to whether we had made rebates on board sales.

Q. Well, your testimony just now— A. (Interposing) And they asked us by what method we did it.

Q. That is right. And they pointed to plaster as being one of the methods? A. Yes.

Q. So that really and honestly you would say that your answer here was a little broad, wouldn't you, because the question says:

"Q. And so far as you know were there ever any Board Survey complaints or investigations which had to do with the prices of plaster or other unpatented gypsum products?"

It had to do with the price of board, but did it not also have to do with the price of plaster?

Mr. Bromley: I object to this as argumentative. Haven't we got all the facts?

Justice Stephens: I think it is argumentative. I think the Court will have to determine whether the answer is too broad, unless the witness is willing to admit it,

4911 and he does not admit it.

Mr. Steffen: Not in terms. He has referred to Exhibits 489 to 501, as having to do with the price of board in conjunction with the price of plaster.

By Mr. Steffen:

Q. Do you wish to qualify your answer in any respect? A. No, I don't, I feel it is an inquiry as to the price of board and as to whether or not we made any rebates.

Q. On the price of plaster? A. No, on the price of board.

Q. By selling plaster at a lower price? A. By any means.

Q. Including the sale of plaster? A. Yes.

Mr. Steffen: I think it can be construed rather obviously.

By Mr. Steffen:

Q. Now further on, at page 4956, line 18, you were asked this question:

"Q. Were there ever any conditions, written or oral, attached to the granting of consents issued to your company by USG for permission to sell these manufacturing distributors?"

And your answer was:

"A. No."

In connection with the Structural matter, where Structural was putting a dealer, or was alleged to have
4912 put a dealer, in the Structural warehouse, you made the point I believe in your testimony that the consent given to sell Structural was conditioned upon Structural selling only to the dealer trade—isn't that correct?

Mr. Bromley: I object to that as assuming facts not in evidence.

Mr. Steffen: I am asking him whether or not he did so testify.

Mr. Bromley: He did not so testify.

Mr. Steffen: Let's ask the witness, not Mr. Bromley.

Mr. Bromley: These people were only entitled to the discount if they were wholesalers, not if they were retailers.

Justice Stephens: You may ask the witness what his testimony was, if he remembers. If not, show it to him. That is the short way.

By Mr. Steffen:

Q. I will show it to him. It is on page 4898. Do you remember, Mr. Lenci, in connection with that transaction? A. I don't remember that as any limitation. As I understood the whole matter, all of our sales to manufacturing distributors were for the purpose of permitting those manufacturing distributors to sell to dealers, in other words, they were wholesalers, they were not retailers.

Q. And that was a condition attaching, would you say now, or would you not, that they should sell as wholesalers and not as retailers? A. Well, that is the
4913 interpretation of it, yes. I wouldn't know as you would call that a condition. I think that is not a condition of sale, but it is a business practice.

Q. Would you call it a limitation? A. No, that was the usual way of doing business. Those manufacturing distributors had all been in business for years, and they are manufacturers and not wholesalers. They are not running a little store, and I don't think it would be necessary to make a limitation or a description of what their activities would be.

Q. Well then, would you say that the consent given to Structural was upon the understanding that Structural would continue to do a wholesale and not a retail business? A. I don't think that question ever came up.

Q. I am raising it now. This question was asked you at page 4898:

"Q. Well, let's see, Kelley had the permission of the licensors to sell a distributor at a discount only if the distributor were acting as a wholesaler and not a retailer, isn't that right?"

And you said:

"A. That is true, yes."

Now was that testimony correct? A. Yes. The
4914 licensor and the licensee both knew from long experience the usual methods of the Structural Gypsum Company in doing business.

Q. And therefore the license was given upon the understanding that they would continue the usual method, is that right?

Mr. Bromley: I object to that as deliberately misassuming facts. Isn't it perfectly obvious that the only question is one of discount? There wasn't any attempt to control the kind of business that Structural did, but if they were wholesalers, then they got a discount. I don't see counsel's purpose in trying to twist it around and make it appear that they were controlling the nature of Structural's business. All we said to our licensees was, "You can give Structural a discount if they are wholesalers."

Justice Stephens: Counsel is entitled on redirect examination to confront the witness with his testimony and ask him if, in comparison with other testimony and other items which are called to his attention, from the record, he wishes to change it or modify it, or admit that it is wrong. But when counsel goes beyond that, and argues with the witness as to what the testimony ought to mean, what it does mean with reference to these bulletins and their provisions, it seems to me that it probably goes into what the Court will have to determine as to the meaning of the testimony.

Now of course the line is sometimes hard to draw,
4915 Mr. Steffen, and we don't mean to unlimit you unduly, and severely, but I think in this instance that you are, conducting in effect now a discussion with the witness as to what his testimony really means, and we have got to determine that ourselves.

Mr. Steffen: I think that is right, your Honor. The two items that I wanted to get brought together are now presented, and I think it is quite proper for the Court to decide whether the giving of the consent was upon an understanding or condition or arrangement.

Then at the foot of page 4956 the question is asked:

"Q. And did you ever have any arrangement or understanding or agreement with USG, or with anyone else, that with respect to these consents, the Ebsary Gypsum Company would police or supervise or seek to control manufacturing distributors' resale prices or practices?"

And you said:

"A. No."

The Witness: Yes.

By Mr. Steffen:

Q. And by that you meant that you had no understanding or agreement with USG that you should go out and check prices or terms of sale by your manufacturing distributors? A. That is correct.

Q. But it is true that you, as you have testified a
4916 moment ago, were interested in the prices at which your distributors sold? A. We were interested in the specific case because in the case you mentioned we also were selling in the same market.

Q. And wherever your distributors were selling in the same market, with you, you were interested? A. Yes.

Q. And you, on occasion, did make complaints to Board Survey concerning sales by Structural when they were buying their board from Kelley? A. Yes.

Mr. Bromley: I object to that as assuming facts not in evidence. There isn't any evidence that there was any complaint about Structural. The evidence is in, and shows it was a complaint about the licensee that supplied Structural. It is all in writing.

Mr. Steffen: I will make just this one point. Mr. Bromley insists that these complaints are all against the licensee and not against the manufacturing distributor, and I will rephrase the question without conceding the point.

By Mr. Steffen:

Q. You did, on occasion, make complaints concerning Kelley's sales to Structural? A. That is correct.

Q. Where Structural was reducing prices or other-
4917 wise causing trouble, is that correct? A. Yes.

Justice Stephens: That again is really a question for the Court to determine, against whom the complaint was being made. You contend it was being made against Structural, and your opponents contend it was being made against the licensee.

Mr. Steffen: Therefore I should be privileged to ask the question either way.

Justice Stephens: You are entitled to confront the witness with his testimony and ask his if he wishes to explain or change it in any manner, or what he meant by it.

By Mr. Steffen:

Q. Now on page 4957 you were asked another broad question:

"Q. Was there ever a time when USG or anyone connected with it ever threatened to withdraw a consent issued to you to sell manufacturing distributors?"

And your answer was:

"A. No.

"Q. Was any statement ever made to you by anyone connected with USG that if you did not control or seek to control the resale prices of these manufacturing distributors to whom you sold under the consents, that the consents would be withdrawn?"

And your answer was:

"A. No."

4918 A. That is correct.

Q. And that is your testimony? A. Absolutely.

Q. You did have a conversation with Mr. Bartlett, did you not, and Mr. Gallagher, at different times? A. That was in no way a threat, implied or otherwise, that they would withdraw their consent.

Q. You did not construe it in that way? A. I did not so construe it at any time.

Q. I want to show you Government's Exhibit 445.

(Government's Exhibit No. 445 was handed to the witness for examination.)

By Mr. Steffen:

Q. Does that affect your testimony at all? A. No, your question was as to whether or not the United States Gypsum Company, as licensor, had ever, directly or indirectly, threatened to withdraw a permission given to the Ebsary Gypsum Company to sell manufacturing distributors.

Q. And this has to do with Kelley's sales? A. Yes, this has nothing whatever to do with that at all.

Mr. Steffen: We have no further questions, your Honor.

Justice Stephens: Is there any recross examination?

Mr. Bromley: Yes, your Honor.

Recross examination

By Mr. Bromley:

4919 Q. This last exhibit, No. 445, Mr. Lenci, hasn't even anything to do with the possibility that USG

might withdraw its consent to Kelley to sell Structural, has it? A. This is our complaint against Kelley. This is an inter-communication from myself to Mr. Ebsary, referring to our complaint against the Kelley Plasterboard Company.

Q. But there is no reference in it as to whether or not USG would or had threatened to cancel its consent to Kelley to sell Structural, is there? A. There is not.

Q. Now a few minutes ago, as I understood you, you told Government's counsel that you had complained against Structural because of what it was doing, and then in the next answer you said that you complained against Kelley based on what Structural was doing.

Isn't it the fact that what you did in this situation that involved Structural was to complain merely against Kelley because you thought Kelley might be violating the license? A. That is correct.

Q. But you never complained to Board Survey, or to USG, that Structural was violating any obligation which it had, either under a license or without a license, did you? A. Our complaints were against the other licensee.

Q. You knew that Structural had no license, didn't you? A. Yes.

4920 Q. And you knew that Structural had no obligation with respect to the maintenance of prices, or with respect to the maintenance of any other conditions which were binding on the licensees? A. Yes.

Q. So the fact is that all of your complaints which had anything to do with what you found Structural was doing in the market, were complaints against Kelley because you thought that evidence of what Structural was doing was some indication that Kelley was violating the license and giving Structural an unduly low price? A. Yes.

Mr. Steffen: I would like to ask that that be related as to point of time. I think the witness has testified that up until 1933, possibly, he thought that the licensor could control the price of a distributor.

Mr. Bromley: I am not making any limitation on it, and I am asking the witness without regard to his views of the law, if the fact is not that at all times his complaints were only against the licensees.

The Witness: That is right.

By Mr. Bromley:

Q. And in connection with what counsel has just mentioned about your state of mind, I want you to look at page

4844 and tell me whether that isn't the place in your
4921 testimony to which you referred this morning as being the place at which you gave the date as 1932, and not 1933. A. Yes, although that was yesterday that I made that statement.

Q. Further, in connection with your state of mind back in 1932 and prior thereto, I want to call your attention to your testimony in the criminal case at page 564.

(The testimony referred to was handed to the witness for examination.)

By Mr. Bromley:

Q. Do you recall that in connection with your testimony about your state of mind you testified that you were under that impression, and then that Judge Goldsborough asked you this question:

"I haven't seen anything in the testimony that was given of transactions to any admission on the witness' part that his purpose or the purpose of his company was to control these distributors' prices."

And you said that it was not.

That is in the middle of the page. Do you remember that? A. Yes, I remember that.

Q. And that is correct, isn't it? A. Yes.

Q. So that without regard to your state of mind, it was never your purpose or the purpose of your company
4922 to control the prices or practices of these manufacturing distributors, was it? A. That is right.

Q. It was not? A. It was not.

Q. Now will you look at Exhibit 405, please?

(Government's Exhibit No. 405 was handed to the witness for examination.)

By Mr. Bromley:

Q. You told Government counsel that in this exhibit, which was your letter to your sales manager of May 23, 1929, that you instructed him to charge for the new covered-edge wallboard, after you got into production and made it, a price of $17.50 per thousand square feet, and that this was the price which USG fixed in its bulletin for No. 2 closed-edge board? A. Yes.

Q. The bulletin fixed the price, as of this time, for No. 1 closed-edge board, at $20, didn't it? A. Yes.

Q. How does it come that you instructed your salesmen to charge for your new covered-edge board when you should

make it, not the price that was set for No. 1, but the price that was set for No. 2 board? A. I don't know. I cannot recall the reasons for that except possibly I felt that we were making a new product and we hadn't a great
4923 deal of confidence in its coming out first-class at the very beginning. It was a new product for us, and maybe I felt it would not be up to the first grade.

Q. Isn't that, as a matter of fact, the reason which caused you to set that price? A. I believe it was.

Q. You remember, don't you, that the production problems involved in the manufacture of this closed-edge board were very difficult? A. It meant quite a change for us. Yes, they were.

Q. And you had a lot of trouble making your new machine work, didn't you? A. We had some trouble, yes.

Q. And that resulted in the production of closed-edge board which certainly was not up to the standard of perfection that the USG board was at that time? A. Well, we didn't have as much trouble as we anticipated.

Q. Well, you thought you would have trouble? A. I was afraid that we might.

Q. So you therefore instructed your salesmen to charge for your board the price which USG had set for No. 2 board? A. That I believe was my reason for making that price.

Q. And that is because you felt at that time that probably the board which you would produce would turn out to be of second grade and not first? A. Yes.

4924 Q. For a while, anyway? A. Yes.

Q. You told counsel also that prior to 1929 the Ebsary Gypsum Company had not used an arbitrary billing weight in the pricing of its gypsum board. Do you remember that? A. Yes.

Q. Well, the fact is that at all times prior to 1929 you had used an arbitrary weight in the sense that you had agreed with the railroads upon a weight which should be considered the billing weight for freight shipments, hadn't you? A. That is correct, but we could not use that to make up our prices for this reason, that we were coming in as a new manufacturer of a product which was already on the market, and if we found a certain price existing in some particular destination we didn't say, "We are going to get so much at the mill and so much freight." We would say that the price at destination at which we

can sell is so much, and that would be the way we would make our price.

4925 Q. I understand that, Mr. Lenci. But so far as the freight which was paid by your customers was concerned, they paid freight to the railroad based on the arbitrary weight of the board which had been agreed upon prior to that time between you and the railroad? A. That is correct, and that was deducted from the amount we got at destination.

Q. And that arbitrary weight which was the subject of an agreement between your company and the railroad, back in those days would remain in existence without change for a period of 6 to 12 months or more, wouldn't it? A. Yes, they ran for quite a long period.

Q. And at that time, if you had sold your board on the basis of a mill price plus the freight, and had figured out your price on that basis, you would have used not the actual weight of the board in figuring out the freight part of the price, but this arbitrary weight which you had agreed upon with the railroad, wouldn't you? A. That is correct.

Q. Now, the reason that that arbitrary weight, in those days, didn't change for long periods of time, was that the railroad didn't come around very often to make the test weighings in order to arrive at an arbitrary figure—isn't that right? A. That is right.

4926 Q. Today, they come around more frequently, do they not, or they did prior to the war? A. Yes. I don't know the exact times, but they come around more frequently than they did then.

Q. So that you agree with the railroad now, on the arbitrary freight weight, at intervals of but a few months? A. Yes.

Q. Did the figure of $75,000, which you said your board machine cost you, include the cost of the driers? A. No, it did not.

Q. Have you any idea how much they cost? A. I know exactly what it was.

Q. How much? A. Our contract with the Coe Manufacturing Company was $100,000 for the driers, and that did not include erection.

Q. It did not include erection? A. No. We had to put it up ourselves.

Q. Likewise, the figure of $75,000, which you gave for the board machine, did not include erection or engineering,

did it? A. It included engineering in this way: They furnished a foreman or superintendent, the manufacturer of the machine furnished a superintendent, who was really the engineer, but it did not include the plant engineering necessary to make the entire installation. We had to do that ourselves.

4927 Q. Now, you said that the change-over in 1929, on this machine, so as to result in its being able to produce closed-edge board, from the standpoint of cost, I think you said, was a rather minor matter. Well, the fact is that it resulted in a major change in operation and in result, didn't it? A. Yes.

Q. And when you said "a rather minor matter", did you mean that the cost was minor in relation to the total cost of the machine as it was originally installed? A. Yes.

Q. These changes, however, resulted in a fundamental and important change in the character of the finished product? A. Yes.

Mr. Steffen: We object to that as calling for a conclusion. If he wanted to ask the witness whether they made an open-edge or a closed-edge board, I should think it would be appropriate.

Justice Stephens: I think the objection is not well taken. Objection overruled.

By Mr. Bromley:

Q. With relation to jobbers, Mr. Lenci, you have in mind, haven't you, that the jobber price was made the same as the dealer price in August, 1930? A. Yes.

4928 Q. Now, isn't it a fact that prior to that date, there never any discussion at any meetings, among the licensees or with the licensor, about jobbers at all? A. Well, Mr. Henning had asked us very early in the period to furnish him with the names of our jobbers.

Q. With that exception, Mr. Lenci, isn't it the fact that prior to August, 1930, there was never at any time any discussion with respect to jobbers whatsoever, in any meetings, among the licensees or with the licensor? A. That is during what period?

Q. Prior to August, 1930. A. I don't know whether we had any meetings during that period at all, or not.

Q. That is what I am leading up to. A. We had the first two or three meetings where the licenses were signed, and then it seems to me there was quite a gap in there.

Q. That is right, sir. So, prior to August, 1930, there never was a time that there was a meeting among licensees, attended by the licensor, except these 2 or 3 that you have testified to that had to do with the negotiation of the licenses, isn't that right? A. That is my recollection, yes.

Q. So that, with that in mind, isn't it the fact that there never was any mention made at any of these meetings, prior to August, 1930, even about the subject of
4929 jobbers, except that Mr. Henning once asked you to send in the names of your jobbers? A. I believe that is correct.

Q. And all of your testimony in response to Mr. Steffen's questions about discussions of jobbers, all arose after August, 1930, isn't that right A. Yes, that was the time when we started to complain that the jobbers were still getting their discounts, and there were numerous complaints then, at our meetings.

Q. But all of those complaints were after August, 1930, weren't they? A. I think they were.

Q. Before you took a license from USG, Mr. Lenci, you could charge any price for board you wanted to, couldn't you A. We could charge any price we could get.

Q. Any price you could get? A. Yes.

Q. Now after the license, you could charge for plaster any price you could get, couldn't you? A. Was your first inquiry on plaster or plasterboard?

Q. On board. A. Yes, all right.

Q. I will withdraw the last question.

After the license, the price which you could charge
4930 on board was fixed, wasn't it? A. Yes.

Q. Now, before the license, you could charge for plaster any price you could get, couldn't you? A. Yes.

Q. That was true after the license, wasn't it? A. Yes.

Q. And this situation which you have called a rebate in your testimony, and which was the subject matter of bulletin provisions and complaints having to do with what you did with respect to the price of plaster and other products, when sold with board, didn't that generally take this form: A salesman would say to a dealer, "I will sell you board. My price is fixed, but if you will buy plaster along with it, you can deduct, when the time for payment comes, an amount,—say, for illustration, $1.50,—for every thousand feet of board that you buy."? A. You are speaking of the cash rebates on the sale of board?

Q. Isn't that the form that it generally took? A. It

would take that form or, in some cases, some of our complaints were based on the fact that the salesman actually passed cash to the customer.

Q. Well, now, I am trying to confine my questions to the situation where you did something to the plaster
4931 price when you sold board and plaster to a dealer. Do you understand that? A. Yes; but your question, I understand, applied entirely to board.

Q. No, I didn't mean it to. So I will start over again. You did sell board and plaster, sometimes, to the same dealer-customer, didn't you? A. Yes.

Q. And after you took the license, you knew that you were prohibited from making an indirect price reduction in your board by giving away plaster, didn't you? A. Yes.

Q. And you knew that prohibition extended to making an indirect price cut in the board by giving a customer plaster at a price lower than you would ordinarily charge in that market? A. Yes.

Q. Now wasn't the form which that transaction usually took, where this kind of rebating was indulged in, as follows:

A manufacturer would say to a dealer, "If you buy a thousand feet of board, I must charge you $30 for it. However, if you buy a ton of plaster, although my ordinary price is $10, when you come to pay for it you can deduct $1.50 from that $10 for every thousand feet of board you buy."? A. We didn't do that.

4932 I know you didn't. But isn't that the thing that you complained about? A. We complained about that,—I am just trying to remember a complaint that we did make. I don't recall that we did make any complaints of that type.

Q. Well, you looked over a whole lot of complaints a few minutes ago, didn't you? A. They were complaints made by the licensor against us, that we had done that. But we had not done it. Those Exhibits 489 to 501 were complaints by the licensor against the Ebsary Gypsum Company.

Q. Well, are you familiar with the fact that this kind of indirect rebating was prevalent in the industry after the licenses were taken? A. Yes.

Q. And isn't it a fact that the form that it would take would be something as I have tried to state it? A. Well, I can only answer in this way, Mr. Bromley: That is our supposition as to one of the forms it took.

Q. Well, do you remember your testimony that a 5-cent reduction per ton in the price of plaster wouldn't mean anything to anybody, but a 50-cent or a $1.00 per ton reduction would? A. Yes, that was in answer to a question by Mr. Steffen as to how much it would amount to
4933 before you got over the deadline.

Q. Now, having that testimony in mind, isn't it a fact that what a manufacturer would do, where he wanted to cut the price of board by reducing the price of plaster, would be to make his reduction in the price of plaster so many dollars per ton for each thousand feet of board that the dealer would buy?

Mr. Steffen: I object, Your Honor. This question has been asked once before, and the witness has said it was merely a supposition on his part.

Justice Stephens: Do you know?

The Witness: I don't know, because we did not do it, and it is impossible to pin these things exactly on the other manufacturers.

Justice Jackson: Mr. Bromley's question is: Wouldn't that be the probable course, if such a thing were to be done?

The Witness: That is the way I tried to answer. I said that would be one of the possible ways of doing it.

Justice Stephens: The witness did also say that it was a supposition.

If you know, from your experience in the industry, how that practice took place, or, as a person experienced and expert in the industry, how it probably would be carried out, you may testify as to that. But if you are just guessing, then we would have to sustain the ob-
4934 jection. What is the fact? Are you testifying from your experience as to how these things would probably be carried out, or from your knowledge, or from a mere speculation?

The Witness: I am testifying as to how they would probably be carried out, not from having seen the transaction, because rebating is something you do not see.

Justice Stephens: Well, the answer of the witness may stand as to that.

By Mr. Bromley:

Q. Now, as I understood you, at page 5069 you said that you made no agreement or entered into no understanding to eliminate jobbers, at the meeting which you attended in May, 1929. Now you didn't mean to limit your testimony to that meeting, did you? A. No.

Q. You never had any understanding or agreement with anybody, other than what is expressed in the license and the bulletins, if any, with respect to the elimination of jobbers, did you? A. That is correct.

Q. And likewise, with respect to your testimony on plaster prices, you never had any understanding or agreement with anybody with respect to plaster prices made at any time, other than what may be contained in the
4935 license agreement or the bulletins, did you? A. That is right.

Q. You also said that after August, 1930, selling through jobbers at a discount was eliminated. Now, you meant to restrict that answer only to patented board, didn't you? A. Oh, yes.

Q. In connection with your bubble license, Mr. Lenci, isn't it the fact that before you made up your mind to take the license, the nature of the bubble invention had been disclosed to you? A. Yes, it was described.

Q. That was described to you by Mr. Avery or Mr. Knode, or both, on May 23, 1929, wasn't it? A. That is right.

Q. And not only was the nature of the invention described, but the savings which it was claimed the use of the invention would accomplish were disclosed to you? A. Yes.

Q. And what you meant in your answer to Mr. Steffen was that the "know-how", or the procedure to put the invention into operation, was not disclosed to you until after you had signed the license? A. That is correct.

Q. Have you any idea of the total amount of royalties that your company has paid to USG under the two licenses which you have had with it?

4936 Mr. Steffen: I don't see the connection, Your Honor, between that question and the re-direct examination. I think this is improper re-cross examination.

Justice Stephens: What do you relate it to, in the re-direct examination?

Mr. Bromley: I am trying to find the place.

Justice Stephens: Very well.

Mr. Bromley: At page 4995, at line 14, he was asked: "Q. And what was the royalty that you were charged under the May, 1929, license; do you remember?"

And he said he didn't remember.

Then he was asked questions on that and succeeding pages—if it was 5 percent it would be 65 cents; and he was asked the question on page 4996:

"Q. So that financially, the saving was such that it was very much to your advantage to take out your license and pay a royalty, was it not?"

And he answered:

"A. It was, yes."

So it would seem to me that the door as to what he paid in royalties has been opened.

Mr. Steffen: We have no objection, Your Honor.

Justice Stephens: Very well. Proceed.

The Witness: I haven't the figures before me, but some time ago I made a computation, and as I recall it,
4937 it ran somewhere between $175,000 and $200,000.

Justice Stephens: Is that related to the bubble board royalties or to all royalties?

The Witness: All royalties, both licenses. As I remember it, it was something under $200,000 up to that particular period.

By Mr. Bromley:

Q. Of course, since you took your closed-edge license only in May, 1929, by far the greater part of that would be related to the starch patent and the bubble patent license, that is, the October, 1929, license, wouldn't it? A. Oh, yes.

Q. Although, of course, the May, 1929, license did continue until 1937, so far as royalties were concerned, although that was merged in the October-November, 1929, license, wasn't it? A. Yes.

Q. That is to say, the royalty provision that was contained in the May, 1929, license, which continued until 1937, was the royalty on the patents covering, among other things, the machine for manufacturing the board, the closed-edge board, wasn't it? A. I believe that is correct.

Q. You told Mr. Steffen, I think, that you made no investigation of the patents before you took the
4938 October-November, 1929, license. Perhaps that answer applied to both licenses, did it? A. Yes.

Q. Isn't all you meant by that answer that you did not go to or consult any patent attorney? A. Yes.

Q. You knew the nature of the closed-edge patents, didn't you, before you took the license? A. Yes, not from a technical point of view or from a patent point of view, but from the actual board and what it looked like and how it would be used.

Q. And you also knew the nature, generally, of the

patents which covered the machine for making the board, didn't you? A. Yes.

Q. And wasn't that likewise true with respect to the patents which were contained in the October-November, 1929, license, that you knew generally the nature of those patents and what they covered? A. Yes.

Q. You knew they covered the foam-bubble invention, didn't you? A. Yes.

Q. And you knew they covered things like the
4939 tongue and groove edge, and the recessed edge? A. Yes.

Q. And you knew they covered starch, for instance, for adhesion? A. Yes.

Q. And you knew that there were many other patents in there that covered refinements, both in the product and in the machine for making the product? A. Yes.

Q. So the fact is that you were generally familiar with the nature of many, if not all of the patents, listed in both the licenses? A. Yes. Maybe I misunderstood the previous question. We didn't make a patent research investigation, as to the validity of the patents themselves, and matters of that kind. We knew generally what they covered.

Justice Stephens: We will take our noon recess at this time.

(Thereupon, at 12:15 o'clock p.m., a recess was taken until 1:45 o'clock p.m., of the same day.)

4940 AFTERNOON SESSION

(The trial was resumed at 1:45 o'clock p. m., pursuant to recess.)

Justice Stephens: Proceed, Mr. Bromley.

Thereupon, GEORGE N. LENCI the witness on the stand at the time of recess, resumed the stand and testified further as follows:

Recross Examination (resumed)

By Mr. Bromley:

Q. At page 5031, Mr. Lenci, your attention was called to the third "Whereas" clause in your May 22, 1929, license, and you said that you imagined that it was the understanding of everybody who took out a license that they were

going to discontinue the making of open-edge board because, so far as you knew, the licenses were all similar.

Now the clause to which your attention was called appears on page 48 of the complaint as to the third paragraph on that page. You will notice that that paragraph says:

"Whereas, Licensor has been unwilling to grant a license except upon the express condition that Licensee will manufacture plasterboard or gypsum wallboard only with a folded or protected edge similar to that manufactured by Licensor, so that Licensor may be protected in its own business of manufacturing and selling said patented products
4941 and realize to the fullest extent the benefits under said patents from the manufacture by said Licensee;".

Now that was the paragraph which you looked at when you answered Mr. Steffen on page 5031, wasn't it? A. Was I shown this at that time?

Q. Yes, I think you were.

Justice Jackson: He probably wasn't shown it from the complaint.

Mr. Bromley: That is right, if the Court pleases, he was shown that paragraph in a different form.

Justice Jackson: You were shown the May, 1929, license agreement between your company and USG, probably.

Mr. Bromley: I see now, at the top of page 5031, you were shown the complaint, and this very page 48, paragraph 3.

The Witness: All right.

By Mr. Bromley:

Q. Now, do you notice that there is another "Whereas" clause which follows the one you have just read? A. Yes.

Q. And that says, doesn't it:

"Whereas, Licensor has agreed to waive the express condition aforesaid and grant the said License in consideration of the agreement of Licensee to pay to it for the license to use the processes and make and use the
4942 machines and/or inventions set forth and claimed in all of said patents and applications for letters patent the amounts hereinafter stated and upon the terms and conditions hereinafter set forth,"—do you see that paragraph now? A. Yes.

Q. Now, in the light of that paragraph, isn't it clear to you that there was no understanding whatsoever on the part of anybody that the licensees would discontinue the making of open-edge board? A. Yes, that is right.

Q. There was no such understanding, was there? A. No.

Q. And there was no understanding that the licensees could not make open-edge board outside of this agreement, was there? A. No.

Q. So that, your testimony is now, isn't it, that there was no agreement or understanding, either in the license or outside of the license, that the licensees could not make open-edge board if they wanted to? A. That is correct.

Mr. Steffen: Your Honor, it is my understanding that our objection to leading questions by the defendant continues, does it?

Justice Stephens: You have a continuing objection to all leading questions on the part of the defendants to this witness, yes. The same is overruled.

4943

By Mr. Bromley:

Q. At pages 5007 and 5008, you testified that you had three reasons for wanting to take a license from USG, and on page 5008 you were asked this question, at line 13:

"Q. You further testified, on page 4654 of the transcript, that the license covered a large number of patents? A. Yes.

"Q. Was that possibly a third reason why you wanted to take out a license? A. Yes."

Now, didn't you mean by that answer that one of the things you wanted to get, or hoped to get, from taking out a license was the benefit of the research of USG which had resulted in the granting of the many patents granted to it, and the filing of the many applications which it had filed, as set forth in the schedules annexed to the license? A. Yes.

Q. You did not mean to create the impression that you wanted to take a license simply because the license covered a large number of patents, did you? A. No.

Q. What you wanted was, so far as the number of patents was concerned, to get the benefit of USG's research staff in inventions relating to the improvement of the product and the means for producing it, didn't you? A. We felt that at some time we might need to make a board that would come under one of those other classifications.

4944

Q. Now at page 5094, in line 10, you said you had substantially made up your mind to take the bubble license as you went home from the May 23, 1929, meeting; do you remember that? A. Yes.

Q. Now, isn't it a fact that as of that time, neither you nor Mr. Ebsary had made any definite decision as to whether you would or not, although substantially you had agreed at that time that if the bubble invention did have the benefits claimed for it, then you thought you ought to have a license? A. We felt after the description given us by Mr. Avery that it would be a valuable thing for us to have, if we could get it.

Q. And you have said at some other place in your testimony that after you came back you talked to others in the industry. Weren't those talks about whether or not the invention, as they understood it, did have the benefits which Mr. Avery claimed for it? A. Yes.

Q. And you convinced yourself, between that time
4945 and the time you signed the license, that the bubble invention did have real benefits in lightness and strength, didn't you? A. Yes.

Q. As I recall your testimony, you several times told Mr. Steffen that when you said you wanted to be competitive, you meant that you wanted to have competition eliminated. Do you recall that you said that on occasions? A. That we wanted to have competition eliminated?

Q. Yes. A. Well, if I said that, I didn't mean that.

Q. When you used the word "competitive", and in your answers said that you wanted to be made competitive, didn't you mean merely that you wanted to be put in a position where you could go into a market and sell your board on as favorable terms as some other company could? A. Yes. We wanted to have the opportunity of meeting them in any market in our area, on an equal basis.

Q. And your area would be that geographical area the limits of which were set by freight rates, isn't that right? A. That is correct, yes.

Q. In other words, if you were selling lath at $13, and it cost you $7 to make it— A. (Interposing) I wish it did.

Q. (Continuing) —you could not sell a customer where the freight rate was more than $6, and stay in busi-
4946 ness, could you? A. No.

Q. So that, if you took a line around your plant, and drew it through the various points where the freight rate was $6, that would define what you have referred to as your area, wouldn't it? A. Yes. That isn't quite a correct example, Mr. Bromley.

Q. But it is the simplest one I can think of, to start with; isn't that so? A. Yes, but it may lead to some question afterwards which would lead someone astray.

Q. Why? A. Well, for instance, supposing that we were going to quote into such a territory as you illustrate, there would be also some competitor of ours who would have a mill price plus his lower freight to that destination. So that it wouldn't be a $6 difference between the two prices.

Q. You mean by that that it might be less than $6? A. Well, may I make it clear—

Q. (Interposing) Tell me, first, do you mean by that that it might be less than $6 in my illustration? A. It would eventually come to the same thing.

Q. Go ahead and give your illustration. A. Take an arbitrary situation: Supposing that the National
4947 Gypsum Company is quoting in Atlanta, Georgia. They would ship out of Savannah. Now suppose they start with a price of $13 mill at Savannah, and we will say that their freight to Atlanta is $3. They would quote $16.

Justice Stephens: They have a mill at Savannah?

The Witness: Yes. They would quote $16 at Atlanta. Then we would see what our freight rate was to Atlanta.

Justice Jackson: From where?

The Witness: From Wheatland, New York.

Justice Stephens: You mean your actual freight rate?

The Witness: Yes, our actual freight cost. We would have a $16 price to start with. Then if that freight rate was $9, the $9 from the $16 would leave the $7 that you are aiming at, do you see?

Mr. Bromley: Yes, sir.

Justice Stephens: And if it cost you $7 or more to make the board, you couldn't sell it there?

The Witness: We could not sell there, no.

Justice Stephens: Your rate to Atlanta would be $16, because under the bulletins you would take the mill base price at Savannah, which would make the rate you would have to sell at under the bulletins exactly the same as National did?

The Witness: That is right.

By Mr. Bromley:

4948 Q. Now that situation, so far as your competitive position is concerned, would be exactly the same, bulletins or no bulletins, wouldn't it? A. Yes.

Q. In other words, if you didn't have a license and didn't have any price fixed, and didn't have any price bulletins, if you wanted to compete against National with a mill at

Savannah, National selling its board at $13 Savannah mill plus $3 Atlanta freight, or $16, you would have to offer your board down in Atlanta at $16? A. That is correct.

Q. And to do that, you would have to absorb the difference between the $9 freight from Wheatland to Atlanta, and the $3 Savannah-to-Atlanta freight, or $6? A. That is correct.

Q. And that would leave you with a net mill return, on your board sold in Atlanta, of $7? A. That is correct.

Q. And if that $7 was equal to or higher than your cost, then you could do business in Atlanta and break even or make a small profit? A. That is correct.

Q. But if the $7 was less than your cost, then you would be losing money if you did business in Atlanta? A. That is right.

4949 Q. Therefore, you would say that you were not competitive in Atlanta and could not do business? A. That is right.

Q. So that, in your testimony, you merely meant, didn't you, that if the market which you were considering was too far away from your mill, or if the terms of sale were such that the service you had to render was too expensive, you would not be competitive in that particular market? A. That is right.

Q. And it is the fact, isn't it, that the license bulletins gave you prices at which you could do business in the markets which you normally served before the license? A. Yes.

Q. That is, the license provisions made you competitive in your normal markets? A. That is right.

Q. And you did not mean to say, in any of your answers, did you, that under the license bulletins all companies would be able to take business in all markets under the same circumstances? A. No.

Q. And as the Presiding Justice said this morning, while the price to the dealer might be the same, your profit or return would be different as between different companies? A. That is correct.

4950 Q. So that, all the price bulletins did, Mr. Lenci, was to fix a floor or a minimum below which a licensee could not go; isn't that right? A. Yes.

Q. And in any given market, that minimum was the same for every licensee? A. Yes.

Q. But that did not mean that these minimum prices put each licensee on the same plane, so far as his cost of servicing the market was concerned, did it? A. No.

Q. And that was so because each licensee had different costs and expenses to get to the market, depending on the location of his mill? A. Yes.

Q. So that, wouldn't you say, sir, that when you used the word "competitive", or "to make yourself competitive", you did not mean the elimination of competition? A. That is correct.

Q. You were asked some questions with respect to the bulletin provisions regarding commission salesmen, particularly at pages 5118 to 5122, and your attention was called to two different types of provisions in the bulletins—one provision in bulletins prior to 1939, and another provision in bulletins subsequent to February 6, 1939.

4951 Do you remember that? A. Yes.

Q. Those two provisions were never in effect at the same time, were they? A. No.

Q. And in connection with this subject, the Presiding Justice suggested that you be asked this question, which I believe you were asked by Mr. Steffen: How does mere selling through a commission salesman accomplish a rebate or allowance? And I think you said you didn't see how it did.

Well, now, isn't it a fact, Mr. Lenci, that if the commission salesman were a man connected with the buyer, then your answer to that question would have to be different? A. Yes, that is true.

Q. And wasn't it a very common practice in the industry for manufacturers, in order to get business, to sell to a dealer and say, "Now, I will pay your president, or your secretary, or one of your salesmen, a commission on this business"? A. That was the basis of some of our complaints against the Kelley Plasterboard Company.

Q. Then you would say it was a common practice, wouldn't you? A. It was at a time, yes, at that time.

Q. In other words, the manufacturer or licensee

4952 would consider, for the purpose of a particular sale, that somebody connected with the buyer was, for that transaction, a commission salesman of the seller, wouldn't he? A. Yes.

Q. And, of course, if the seller paid a salesman connected with the buyer a commission, and the salesman turned that in to the buyer, that was a rebate, wasn't it? A. Yes.

Q. Now you are familiar, aren't you, with the difference

in wording between this commission salesman clause as it existed prior to 1939, and as it existed afterward? A. Yes.

Q. Quite apart from the wording, Mr. Lenci, wasn't it your understanding at all times that these provisions, that is, the earlier form of commission salesman provision, only applied to the use of commission men for the purpose of cutting the price of patented board? A. I believe that was the intent of that clause.

Q. Well, isn't it a fact that so far as you know, neither Board Survey nor USG ever made any attempt to enforce it in the broader sense, that is, to compel you to get rid of commission salesmen if you had any? A. That is correct, yes.

Q. And you remember that that earlier clause said that the employment of commission salesmen wholly or
4953 partly on commission would be considered a violation of the license, don't you? A. Yes.

Q. Now, during this entire period, this man Blanchfield of whom you spoke was, to say the least, employed partly on a commission basis by your company, wasn't he? A. That is right.

Q. And he went on receiving a commission from 1926 to 1940, didn't he, the whole period involved here? A. Yes.

Q. And you never— A. (Interposing) I don't think it was quite as late as 1940, but that is immaterial.

Q. Well, up to 1939? A. It was up to the latter part of the 30's, yes.

Q. And you were never told by Board Survey or USG, or any of their representatives, either in the nature of a formal complaint or otherwise, that you must discharge your commission salesmen? A. No.

Q. And isn't that likewise true of the provisions with respect to warehouses and customers' trucks, that is to say, that your understanding of the purpose of those provisions —whatever the wording was—was that those arrangements were prohibited only where they were used to effect
4954 a cut in the price of the patented board? A. Yes.

Q. At page 5133, this question of mine was repeated to you:

"Q. Now in connection with those questions, I would like to ask you now—did you understand that there was anything in your license contract, or in the bulletins, which provided that USG should raise or stabilize the prices of gypsum board?"

And you finally said that that was a double question, and you say "No" as to raise, but "Yes" as to stabilize. A. Yes.

Q. Now you know, don't you, that under your form of license agreement, USG had no obligation whatsoever to fix prices? A. They had the right.

Q. They reserved unto themselves the right to fix prices, didn't they? A. That is correct.

Q. But they had no obligation? A. No, that is true.

Q. They made no promise that they would exercise that right at any time, did they? A. No.

Q. Now, likewise you knew, didn't you, that any
4955 price bulletin issued by USG under the license could be withdrawn by USG at any time? A. Yes.

Q. So that, isn't the change in your answer, which you made to Mr. Steffen, incorrect? And weren't you right in the first place when you told us that there was nothing in the license contract or in the bulletins which provided that USG should stabilize the prices of gypsum board? A. Your interpretation of it is correct, Mr. Bromley. They had no obligation to do it, but they had the right to do it.

Q. And, of course, your testimony still stands, doesn't it, that there was no agreement or understanding, outside of the license agreement, that USG either would raise or stabilize prices? A. That is correct.

Q. At page 5142, you were asked this question, with respect to the Structural Gypsum Company, beginning at line 11:

"Q. And did they deliver directly to the job, to the contractors in Philadelphia, for example? A. No, I don't think we ever had any complaint as to that."

Now when you said, "I don't think we ever had any complaint", you meant that you never received any com-
4956 plaint from your dealer-customers about that, didn't you? A. That is, that the Structural had delivered to the contractors—

Q. (Interposing) In Philadelphia. A. Yes.

Q. Is that what you meant? A. Yes.

Q. And didn't you also mean, when you said, "I don't think we ever had any complaint", that you had had no complaint from your own salesmen? A. That is right.

Q. And on the next page, beginning at line 4, you were asked this question with respect to Structural selling at prices lower than your prices:

"Q. And had you known about it you would have made a

complaint? A. I believe we would have, because they were in the same markets that we were in."

Now when you said, "I believe we would have (made a complaint)", you didn't mean that you would have made a complaint to USG, but that you would have complained to Structural? A. Yes.

Q. You knew that neither you nor USG had any
4957 right to control Structural's prices? A. That is right.

Q. But you felt that you had a right to complain to them, since you were selling them the material at a discount, which they were using to undersell you? A. That is right.

Q. Now, beginning at the bottom of page 5155, and going over to page 5156, you were asked this question:

"Q. And you mean by that to say that USG, the licensor, had granted to Kelley authority to sell to Structural only if Structural sold at wholesale?"

And you answered:

"A. As a manufacturing distributor, yes."

You knew, didn't you, that there was no restriction whatsoever, under the bulletins or the license, upon your right to sell to these manufacturing distributors, but that the only restriction was upon your right to give them a discount? A. Yes.

Q. You could sell to these manufacturing distributors at the dealer's price without any limitation whatsoever, couldn't you? A. Of course.

Q. At all times? A. Yes.

Q. And the only restriction you had was that you
4958 couldn't sell them at a discount without permission? A. Yes.

Q. And you knew, didn't you, that the price bulletins made a provision that this consent to give a discount only applied to the extent that the manufacturing distributors did a wholesale business? A. Yes.

Q. Will you look at the July 20, 1933, bulletin, which is Exhibit 38, page 92. Do you see the last paragraph there, Mr. Lenci? A. Yes.

Q. That is the provision to which I have just referred, isn't it? A. Yes.

Q. And that provides that the permission to sell at a discount is restricted to sales of patented board and lath to said manufacturers for resale to the dealer trade at wholesale, and is not to apply to such materials sold at retail? A. That is correct.

Q. So that, if Structural, during the time that it was being sold by you, for instance, changed the character of its business and became a dealer instead of a wholesaler, then you would have had no permission to give them a discount, would you? A. No, that is right.

4959 Q. And therefore, you felt that it was encumbent upon the supplier, did you not, to keep himself informed and make sure that Structural, while it was getting the discount, did not change the character of its business? A. That is right.

Q. Now the normal character, as you said, of the businesses of all of these manufacturing distributors, was the wholesale business, that is, to sell the dealers, wasn't it? A. Yes.

Q. And this complaint about which you were questioned was a complaint that Structural, contrary to normal procedure, had gone into the retail business by establishing a dealer at its mill, and selling directly to ultimate consumers rather than to dealers; isn't that right? A. Yes.

Q. And you felt that that was a legitimate subject to be inquired about by the supplier, Kelley, who at that time was selling Structural? A. Yes.

Q. So that when you told Mr. Steffen, on page 5156, in answer to the following question:

"Q. If Structural sold to retailers, then your understanding is that that was contrary to the arrangement between the licensor and Kelley?"

And you said:

4960 "A. Yes." You merely meant that Kelley no longer had any right to give Structural the discount? A. That is right.

Q. You did not mean to suggest, did you, that there was any arrangement between the licensor and Kelley by way of attempting to control the kind of business that Structural did? A. I meant the arrangement as to the commission.

Q. As to the discount? A. Yes, as to the discount.

Q. And is that true of your answer to this question, on the same page:

"Q. Is that your understanding also with regard to the Connecticut Adamant Plaster Company, that they should only sell to dealers? A. I would say it would be the same thing.

"Q. And the same would be true of Oakfield? A. Yes.

"Q. That they might not sell to but one class, that is, to dealers? A. Yes."

You didn't mean to create the impression that there was any agreement limiting the business that these manufacturing distributors could do, did you? A. No.

4961 Q. You merely meant to say that they were not entitled to a discount under the license and the consent and the bulletins, unless they confined themselves to a wholesale business? A. That is right.

Q. Or at least, to the extent that they did a retail business, they were not entitled to a discount on such part of their business? A. Yes.

Q. Now at page 5158, still with respect to Structural, you were asked this question:

"Q. Can you say, Mr. Lenci, that in point of fact you did expect something to be done about the Structural situation? A. We expected that Kelley would check up and not continue what we thought he was doing, and that is, giving a commission to Structural and allowing them to do all these different things they were doing at that particular time."

Now when you said "giving a commission to Structural"— A. (Interposing) I should have said an excessive commission, that was what I should have said.

Q. And when you said, "and allowing them to do all these different things they were doing", you meant "and thus allowing them"? A. Yes, that is right.

4962 Justice Stephens: When you use the word "commission", do you mean commission, as such, or discount?

The Witness: Discount, I mean. I should have said discount.

By Mr. Bromley:

Q. And when you say "excessive discount", you mean a discount in excess of the amount provided for in the consent, to-wit, 15 percent on board and 12-1/2 percent on lath; is that right? A. That is right, yes.

Q. Now at page 5031, at the bottom of the page, you were asked this question and gave this answer:

"Then it is a fact, would you not say, Mr. Lenci, that if you had to pay a royalty on open-edge board, and it also cost more to manufacture open-edge board, that it was a business impossibility to continue making open-edge board? A. Well, it would be, on that assumption, yes."

Well, it was the additional cost, rather than the royalty, which would have made it difficult to market the open-edge board, wasn't it? A. Yes, that is true.

Q. The royalty in itself would not have made it a business impossibility to manufacture and sell it, would it? A. No, it was the open-edge board, that was impossible to sell.

4963 Q. Because of its character? A. Because of its character.

Q. And because of its cost? A. Of its cost to manufacture, yes.

Q. Those were the chief factors which led you to conclude that it would be a business impossibility to continue making and selling it? A. Yes.

Q. And when you said "business impossibility", you meant merely that it would make it very difficult for you to do it and make money? A. That is right.

Justice Jackson: Did you mean to say, Mr. Lenci, that it would cost you more to make the open-edge board than the closed-edge board?

The Witness: Oh, yes.

Justice Jackson: On account of the wastage?

The Witness: Yes.

By Mr. Bromley:

Q. Now, at page 5089, you were asked some questions about joint filler, and you said that this was one of the points brought up by Mr. MacLeish at a meeting.

Now, Mr. MacLeish's first appearance at a meeting was in October, 1932, wasn't it? A. That was at the time that he was reporting on the audit?

4964 Q. Yes. A. Yes.

Q. And don't you now remember that this matter of joint filler, and the giving away of carpenters' aprons and joint filler to accomplish a rebate in the price of patented board, was something which was not mentioned by MacLeish at all in 1932, but happened back on June 6, 1929? Let me show you page 4177 of the transcript.

(Transcript handed to the witness.)

By Mr. Bromley:

Q. Does that refresh your recollection, or not? A. Yes, because when I was testifying there, I believe I was referring to my memorandum as to that meeting of June 6.

Q. And your memorandum of June 6 is Exhibit 419 for Identification, isn't it? A. Yes.

Q. And item 10 on that memorandum has to do with joint filler? A. That is right.

Q. The reference is: "No free finisher", on Exhibit 419 for Identification, isn't it? A. Yes.

Q. But "finisher" is joint filler, isn't it? A. Yes.

4965 Justice Stephens: What is the date of that exhibit?

The Witness: June 6, 1929.

By Mr. Bromley:

Q. So that you were mistaken in your testimony that this matter of no gifts of joint filler was brought up by MacLeish in October, 1932, but the fact is, as you know now, that it was brought up by somebody else on June 6, 1929; isn't that correct? A. That is correct.

Mr. Bromley: That is all.

Justice Stephens: Mr. Varian, have you any further questions?

Mr. Varian: No, I have not. I think Mr. Bromley has adequately covered it.

Justice Stephens: Do any counsel for any of the other defendants have any further re-cross examination?

(No response.)

Justice Stephens: Is there anything further, Mr. Steffen?

Mr. Steffen: Nothing further.

Justice Stephens: You are excused, Mr. Lenci, and thank you for attending the court.

(Witness excused.)

Justice Stephens: Call your next witness, gentlemen.

Mr. Steffen: Mr. Hansen, please.

4966 Thereupon, EMIL HANSEN called as a witness for and on behalf of the United States, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Steffen:

Q. Will you state your full name, Mr. Hansen? A. Emil Hansen.

Q. And your address?

Q. And your address? A. 300 West Water Street, Syracuse, New York.

Q. What company are you connected with, Mr. Hansen? A. With the Paragon Plaster Company.

Q. What is your position with that company? A. President and Treasurer.

Q. How long have you been connected with the Paragon Plaster Company? A. Since 1908.

Q. And were you an officer all through that time, Mr. Hansen? A. No, sir.

Q. When did you become an officer? A. To the best of my recollection, in 1914. That is approximate.

Q. And what is the business of the Paragon
4967 Plaster Company? A. The Paragon Plaster Company were manufacturers of brick, concrete products, and sanded wall plaster, and distributors of various building materials, both retailers and wholesalers.

Q. And among those materials, what did you handle?

Justice Stephens: I don't understand yet, Mr. Hansen, whether you were describing yourself as both retailer and wholesaler, or whether your distribution was to both retailers and wholesalers?

The Witness: I am describing our own business here.

Justice Stephens: I see, thank you.

The Witness: May I enlarge on that? We did a retail business in the City of Syracuse, selling to the consumer. Outside the City of Syracuse, we sold to dealers throughout New York State, and at times in New England and other territories.

By Mr. Steffen:

Q. What products did you sell? A. We sold lime, insulation board, gypsum wallboard, and in the very early days we sold Portland cement to dealers. We sold fire-brick. That is generally descriptive. The list would contain about 50 products.

Q. Now what about plaster? A. We manufactured at
Syracuse sanded wall plaster, and retailed that at
4968 Syracuse and sold to dealers throughout the Eastern part of the country, a business that we started in 1888.

Q. When you say you manufactured wall plaster, did you manufacture the stucco? A. We did not, no.

Q. And during this period, where did you get your stucco?

As I understand it, stucco is the base from which you make plaster, isn't it? A. That is right. Now, I can only speak from hearsay for the period of 1888 to 1908.

Q. That will satisfy me, I want to know just in general. A. From 1908, for quite a period, we got our stucco from the

Niagara Gypsum Company, in which we had a substantial stock interest and of which we were partially the organizers. That was located at Oakfield, New York.

That continued until approximately the year 1921 or 1922, at which time we, with two other companies having mixing plants, which we called the sanded plaster plants, organized the Oakfield Gypsum Products Corporation, and built a new mill at Oakfield, New York. From that time on, our gypsum came from that source.

Q. From that time until when? A. From that time until 1938, when we sold the Oakfield Gypsum Products
4969 Corporation to the National Gypsum Company, and from then on, under contract, got our gypsum from the National Gypsum Company.

Q. By "gypsum", you mean what I have called stucco? A. Yes, the stucco.

Justice Stephens: Mr. Steffen, there was a point in this testimony when the word "stucco" was being used as descriptive, as I remember the testimony, of a synthetic gypsum as distinguished from the gypsum rock. Are you using it in that sense now?

Mr. Steffen: No, we might bring that out by the witness.

By Mr. Steffen:

Q. What do you mean by "stucco"? A. Stucco is used as the tradename for calcined gypsum, whether it is synthetic or made from the natural rock.

Q. And you, at the Oakfield Gypsum Products plant, made which kind? A. Made it from the rock. We mined the gypsum rock and calcined it.

Q. And you had a plant to produce stucco from the rock mined there at Oakfield, New York? A. Yes.

Q. Now, let's look at that company. That company was formed when, the Oakfield Gypsum Products Corporation?

A. I think we started our organization in 1920, and
4970 we were building our plant in 1921.

Q. And that was a plant to convert rock into stucco? A. That is right.

Q. Did the Oakfield Gypsum Products Company make any other product? A. We manufactured wall plaster of various types.

Q. At Oakfield? A. At Oakfield. And at one period we made gypsum block.

Q. Now, this Oakfield Gypsum Products Company was formed, you say, in 1920, and was sold in 1938, the property

being sold to the National Gypsum Company? A. That is right.

Q. And you have been procuring your stucco for plaster, since that time, from the National Gypsum Company? A. That is correct.

Q. Are you a stockholder in the National Gypsum Company? A. We are.

Q. By that, do you mean personally, or the corporation? A. Personally and the corporation, also.

Q. Are you an officer or director of the National Gypsum Company? A. No, sir.

Q. Now, who were the other companies that you mentioned, of which there were three, the other compa-
4971 nies that formed the Oakfield Gypsum Products Company? A. The American Hardwall Plaster Company, of Utica, New York, and the Paragon Plaster & Supply Company of Scranton, Pennsylvania.

Q. Were there any other shareholders in Oakfield? A. No.

Q. Just the three companies? A. Just the three.

Q. And was the share ownership equal? A. That is right, it was. Each owned a third.

Q. Now in the organization of Oakfield, did you hold an office in that company? A. Yes, sir. I was not an officer in 1922. I was a Director, but not an officer.

Q. When did you become an officer? I became an officer in 1930.

Q. And what was the office? A. I became the Secretary.

Q. And you continued in that position until 1938? A. Yes, Secretary and Vice President, I think it was, to make the answer complete.

Q. Do you know, or are you familiar with the organization of the American Hardwall Plaster Company? A. Yes, to a reasonable extent.

Q. What is the nature of their business? A. The
4972 same type of business that ours is, generally.

Q. And do you know approximately when they were organized? A. About 1890.

Q. And they are located at Utica? A. At Utica.

Q. Who was the principal officer of the American Hardwall Plaster Company? A. At what time?

Q. Beginning with, say, 1920? A. Mr. J. L. Hughes.

Q. Who else? A. Mr. Hughes was the General Manager. I don't remember who, at that time, was the President of

the organization. I think Mr. Thomas R. Proctor.

4973 Q. Following that time, who became the president, or one of the superior officers of American Hardwall? Did Mr. Merriam or Mr. Eldred become officers? A. Of the American Hardwall?

Q. Yes. A. Mr. Eldred. Mr. Merriam was in Scranton, sir.

Q. And by "Mr. Eldred", you mean who? A. Mr. T. P. Eldred.

Q. What was his position with American Hardwall? A. He was General Manager of it, and, I think, the Secretary.

Q. Was he connected with Oakfield? A. Yes, he was Treasurer of the Oakfield Gypsum Products Corporation from sometime in the 20's.

Q. Do you know where Mr. Eldred is now? A. Mr. Eldred is in Utica. He is at home recovering from a very severe operation. He had a kidney removed.

Q. Do you know about when he had that operation? A. When he had the operation?

Q. Yes. A. Just about Christmas, I think shortly after that.

Q. And he is very seriously incapacitated right now? A. Yes; he had an embolism following the operation.

Q. Now you speak of Mr. Merriman as being connected with the Paragon Plaster & Supply Company of Scranton; is that correct? A. Yes.

4974 Q. What is his full name? A. E. L. Merriman.

Q. What was his office with the Paragon Plaster & Supply Company? A. He was the Treasurer and General Manager.

Q. And I think you told us, when you were here the last time, that he died recently, did you not? A. He died on the date that first appeared here.

Q. That was last month? A. Yes, that is right.

Q. Was Mr. Merriman connected with the Oakfield Gypsum Products Corporation? A. Yes sir, he was a director and the original vice-president, and on the death of the president of the company, who at its organization was W. K. Squier of my company, he became the president of Oakfield Gypsum Products Corporation.

Q. The business of the Paragon Plaster & Supply Company was what kind of business? A. Similar to ours, with a sanded plaster mixing plant, and the distribution of various building products in the mason materials field.

Q. That is, they sold at retail in Scranton and also dis-

4975 tributed— A. (Interposing): It was very much the same character of business as ours.

Q. Now was there an Executive Committee of the Oakfield Gypsum Products Corporation, or how was it managed? A. Yes, it was operated by an Executive Committee.

Q. And who were the members of the Executive Committee? A. The original members were W. K. Squier, E. L. Merriman and J. L. Hughes.

Q. Beginning at about 1929 or 1930— A. (Interposing): In 1930 they were E. L. Merriman, T. P. Eldred, and myself.

Q. And you continued in office until the Company was sold out in 1938? A. That is correct.

Q. Well, now you have stated the Oakfield Gypsum Products Corporation made stucco, and that it was managed by an Executive Committee of you three members, that is Mr. Merriman, Mr. Eldred and yourself? A. That is right.

Q. And the stucco was sold to the three shareholding companies? A. That is correct.

Q. Paragon Plaster Company, American Hardwall Plaster Company, and Paragon Plaster & Supply Company? A. Yes.

4976 Q. Describe your sales between Oakfield and the Paragon Plaster Company and the other two constituent companies? What I want to get at is this. Oakfield was a separate concern, was it, and it kept separate books? A. Yes.

Q. And there were sales made by Oakfield to Paragon Plaster Company, to Paragon Plaster & Supply Company, and to American Hardwall? A. That is right, with some other business.

Q. That is, between the companies? A. No, Oakfield sold to some others.

Q. Well, to begin with, Mr. Hansen, did Oakfield Gypsum Products Corporation sell generally, or did it sell wholly to the three shareholding companies? A. Generally only to the three, with the exception of crushed gypsum rock. We had quite a business with cement companies to which Oakfield sold direct, the Portland Cement companies.

Q. And did that business continue on through— A. (Interposing): Yes, that continued on.

Q. Oakfield handled that as a more or less separate enterprise?

Mr. Bromley: I object to that as incompetent, as calling for a conclusion.

Mr. Steffen: I think it is immaterial, your Honor.

4977 Mr. Bromley: I object on that ground too.

Justice Stephens: If you think it is immaterial, the objection is sustained.

Mr. Steffen: It was more or less a preliminary question.

By Mr. Steffen:

Q. Reference was made to synthetic stucco, Mr. Hansen. Where is synthetic stucco, or where was synthetic stucco, produced, that you know of? A. Well, the only plant that I know of that manufactured it was the one in the vicinity of Kearny, New Jersey, operated by the Structural Gypsum Company.

Q. The Structural Gypsum Company was a subsidiary of — A. (Interposing):—the American Cyanamid Company.

Q. And it was operated during this period of time, or could you tell us what period of time it was operated? A. I couldn't tell you, but it was in operation during this period of time.

Q. And they made stucco by a synthetic process? A. I wouldn't be expert enough to tell you how it was made, sir.

Q. But it was not mined? A. It was not mined, that is right.

Q. And that stucco was made up into plaster, was it, and sold in competition with the plaster that your companies made? A. Yes.

4978 Q. Could you tell us what the relative prices of the two plasters were, that made by your companies and that made by Structural?

Justice Jackson: Do you mean which was the more expensive?

Mr. Steffen: I wanted to know if they were competitors of Mr. Hansen?

The Witness: We were competitors in some fields, not to any great extent. We were competitors when we sold around the metropolitan district; but they didn't sell very much in upper New York State.

By Mr. Steffen:

Q. And did you sell in the metropolitan district to any extent, sell your plaster? A. We did in the early days, yes, in the 20's and into the 30's.

Q. And during that period the Structural people were a competitor of yours? A. That is right.

Q. And were their prices high or low? A. I don't recall; I know that we succeeded in selling to some extent.

Q. Was their product as good as the product that you made, would you say? A. We didn't admit it.

Mr. Bromley: It seems to me that that is immaterial.

4979 Justice Stephens: What is this all about, Mr. Steffen?

Mr. Steffen: I wanted simply to develop some of the background of the business of selling plaster and board.

Justice Stephens: We will take the three o'clock recess at this time.

(Whereupon, a five minute recess was taken, at the conclusion of which the trial was resumed as follows:)

4980 Justice Stephens: Proceed, gentlemen.

By Mr. Steffen:

Q. You were telling us that the Oakfield Gypsum Products Corporation was acting as a producing company for the three shareholding companies? A. That is right.

Mr. Bromley: I object to that as calling for a conclusion. I don't think that is his testimony at all.

Mr. Steffen: Then I will ask it the other way.

By Mr. Steffen:

Q. Is that true, Mr. Hansen? A. Yes, sir.

Q. And they would manufacture stucco, and would they ship that to the three shareholding companies? A. Yes.

Q. That was for what purpose? A. That was for the purpose of making sanded plaster at the three mixing plants.

Q. And what about neat plaster? A. They also made a neat plaster and various other types of plaster.

Q. And did they make that for your three companies? A. For the three companies, yes.

Q. How was it branded? A. It was put up under
4981 three different brands, according to who ordered it.

Q. According to which of the three companies ordered it? A. Yes, the American Hardwall or Paragon Plaster or Paragon of Scranton.

Q. Did the Oakfield Gypsum Products Corporation act as shipping agent in making up cars for the three companies? A. Yes.

Q. Describe that. A. Orders would be sent up from

Utica, Syracuse or Scranton in the name of one of the companies, for making up the mixed cars, and they would be loaded with whatever the order called for. There were stocked at Oakfield such products as were required for mixed-car shipments, such as white plaster and hydrated lime, and gypsum board and gypsum lath.

Q. And these shipments would be made to fill Paragon's orders, for example, in sales to dealers? A. To dealers, yes.

Q. And the same would be true with regard to American Hardwall and the other Paragon company? A. That is correct.

Justice Stephens: Refresh my recollection, what is "neat" plaster, as distinguished from other plaster?

Mr. Steffen: Mr. Hansen, will you refresh all our
4982 recollections on that point?

The Witness: Neat plaster is calcined gypsum, mixed with certain other ingredients for purposes of plastering on walls, with the addition of sand at the job.

By Mr. Steffen:

Q. And "sanded" plaster is what? A. Sanded plaster is plaster in which the sand is added at a mixing plant, whether at the point of manufacture or at some mixing plant located separately; so that when it gets to the job it is used just as it comes from the bags, with the addition of water. No sand is added at the job.

Justice Stephens: Is there a difference in quality between sanded plaster and neat plaster? Is it different looking or does it contain different ingredients?

The Witness: Well, there is sand in the sanded plaster.

Justice Stephens: I understood you to say there was sand in the neat plaster—maybe I misunderstood you.

The Witness: There is no sand in neat plaster. With neat plaster the sand is added at the job. For instance, to plaster this building you would have your bags of neat plaster here and a load of sand.

Justice Jackson: To put on a white hardwall finish, you wouldn't add any sand?

The Witness: The sand would go in the base coats.

Justice Jackson: I am talking about the surface
4983 coat; then you would use it neat, meaning by itself, wouldn't you?

The Witness: Well, the hard white finish is mostly lime with some white calcined gypsum used as a setting agent.

Justice Jackson: One of the witnesses heretofore stated, when I asked him about the old-fashioned hardwall, white hardwall, that he assumed they used gypsum as they used to use lime.

The Witness: Yes.

By Mr. Steffen:

Q. They use a white plaster for the hard finish, do they not? A. Yes.

Q. And there is a mixture of lime with that? A. Right.

Q. Mr. Hansen, during the years 1926, 1927, 1928 and 1929, did the Paragon Plaster Company purchase gypsum board? A. Yes, sir.

Q. And so far as you know did the American Hardwall Plaster Company and the Paragon Plaster and Supply Company also purchase gypsum board? A. Yes.

Q. Where did your company buy board? A. Well, from various sources. The Universal Gypsum and Lime Company was probably our principal source, as I recall it, during that period.

4984 Q. Did you at one time buy from Niagara? A. Yes we bought from the Niagara Gypsum Company also, until they went out of business.

Q. Now, when you were buying gypsum board from Universal, how was that shipped to you? A. That would be shipped directly to us at Syracuse.

Q. Would it also be shipped to you at Oakfield? A. Well now, you said the Paragon Plaster Company. No, anything that was shipped to Oakfield was bought by the Oakfield Gypsum Company.

Q. I understand. And was the Oakfield Gypsum Company buying board, to your recollection, in 1927 and 1928? A. Yes.

Q. And were they supplying that board in mixed cars, which you have described, where they were shipping out neat plaster with your branded name, for example, and also lime, and possibly board—were they doing that at that time? A. They were shipping that out for us, yes.

Q. Do you recall about what time you, the Paragon Plaster Company, commenced buying board in this way from Universal Gypsum and Lime Company?

Mr. Bromley: In what way does "this way" mean? May we have that clear?

Mr. Steffen: In the way he has just described, that is buying it for Paragon, as I understand it, and also

4985 buying some which came to the Oakfield Products Company.

The Witness: That would go back, I should say, to the starting of the Oakfield Gypsum Company, the Oakfield Gypsum Products Corporation.

By Mr. Steffen:

Q. They were dealing in board at the very beginning? A. Yes.

Mr. Bromley: I don't understand this witness to say that Paragon bought board from Universal that went to Oakfield.

The Witness: No, I didn't say that.

Mr. Bromley: That is what the question assumed.

The Witness: I didn't understand it so.

By Mr. Steffen:

Q. Will you clarify that, please? A. Oakfield bought the board that went to Oakfield, and during the period that you have asked me about, the Paragon Plaster Company bought the board that went to Syracuse.

Q. And you kept separate books? A. Yes.

Justice Stephens: What do you mean by saying "went to Syracuse"—do you mean that it went to the Paragon Plaster Company at Syracuse?

The Witness: Yes.

Mr. Bromley: Could we have straightened out what happened to the board that Oakfield bought that you
4986 said was put in mixed cars? That was sold by Oakfield to Paragon, wasn't it?

By Mr. Steffen:

Q. When Paragon sold a mixed car to a dealer, and it included neat plaster with your brand name and was to come from Oakfield and be shipped directly to your dealer-customer, if you also included board, it was the practice for Oakfield to load the board at Oakfield in that mixed car? A. That is right.

Q. How did you handle the sales transactions or the dealings as respects that board? A. That board was invoiced by the Oakfield Gypsum Products Corporation to the Paragon Plaster Company.

Q. And shipped to your dealer? A. Yes.

Mr. Bromley: When you say "invoiced", you mean

that Oakfield sold it to Paragon and that Paragon paid for it?

The Witness: Yes.

Justice Stephens: Is that what you mean?

The Witness: Yes.

Mr. Steffen: That was my understanding, your Honor.

By Mr. Steffen:

Q. That you carried through the form of a sales transaction from Oakfield to the three parent companies?

Mr. Bromley: I object to that, "that you carried through the form"—as calling for a conclusion.

4987 Justice Stephens: The question as phrased is in a conclusional form. Ask the witness whether it was an actual sales transaction.

By Mr. Steffen:

Q. Will you explain the transaction for the benefit of everybody, please? A. Oakfield bought these various products that had to go into the mixed-car shipments. When the mixed cars were shipped, all the material in the cars was billed to the Paragon Plaster Company, or to one of the three companies, whichever did the ordering.

Q. And it was shipped, I think you testified to Paragon's dealer-customer? A. That is right.

Q. And when Oakfield purchased board for this purpose it acted pursuant to the direction of the executive committee of the Oakfield Gypsum Products Corporation, or did it? A. That is correct.

Q. And you were a member of the executive committee? A. That is right.

Q. I want to show you what has been marked as Government's Exhibit No. 559, which is a letter from the Universal Gypsum and Lime Company, signed by Mr. W. G. Stromquist, under date of January 25, 1928, and addressed to the Paragon Plaster Company, Syracuse, New York,

4988 attention of Mr. Emil Hansen, secretary.

(Counsel hands the document to the witness.)

Justice Stephens: This proposed exhibit refers to a letter. Is the letter of July 9th, which is the next succeeding one in this set of exhibits, the letter to which it refers?

Justice Jackson: It can't be; that next letter is dated in July of the same year and this is January.

Mr. Steffen: May I see Exhibit 559, please?

(Document was handed to Mr. Steffen.)

Mr. Bromley: Now, have you changed the form of the papers in which you handed them to the witness?

Mr. Steffen: I have disengaged the original letter, Exhibit 559, from the other one. They were apparently improperly put together because one relates to January 25, 1928, and the other to July 9, 1928.

Justice Stephens: Exhibit 559 is the single sheet alone, now?

Mr. Steffen: The single sheet. There was some error on our part in attaching those together.

By Mr. Steffen:

Q. Have you examined Government Exhibit 559, Mr. Hansen? A. Yes, sir.

Q. And can you say whether or not you received that letter? A. Yes, sir.

4989 Mr. Oliver: If the Court please, may we see that exhibit?

Justice Stephens: Yes, sir. Mr. Marshal, submit it to counsel.

(Government's Exhibit No. 559 was handed to counsel.)

Justice Stephens: Isn't there a set of photostats of these exhibits? They were on the desk of the judges this morning.

Mr. Knuff: They were put on the clerk's desk.

Mr. Johnston: We didn't know anything about them until the recess a few minutes ago.

Justice Stephens: Isn't there some way that we can establish diplomatic relations between counsel for the defendants and the clerk so that each can know what the other needs?

If you have any of those exhibits handed to you, Mr. Clerk, call the attention of defendants' counsel to them so that they can have the benefit of them.

Where are those exhibits now, Mr. Clerk?

The Clerk: Mr. Bromley has one set and the judges have the other three.

Justice Jackson: Have you seen this Exhibit 559, Mr. Finck?

Mr. Finck: Yes, your Honor, I did.

(Government's Exhibit No. 559 was returned to the witness.)

By Mr. Steffen:

4990 Q. Could you tell us now, Mr. Hansen, whether or not that was at about the time you were buying gypsum board from the Universal Gypsum and Lime Company? A. That is correct.

Q. And could you tell us what the phone conversation referred to therein was about? A. No, I couldn't remember that, sir.

Q. Could you tell us whether or not you received prices in connection with this letter?

Mr. Bromley: I object to that as immaterial, on the ground that there is no charge in the complaint or in the bill of particulars that the retail prices of purchasers such as the Paragon Company, were controlled. The ruling which applied to the alleged control of resales of the Witness Perry should be applied in this instance.

Justice Stephens: What is the purpose of this testimony; what are you intending to prove by it as far as the complaint is concerned, or rather as far as the charges in the complaint is concerned?

Mr. Steffen: We don't wish to make an issue on this letter, your Honor. I would like to show him the next exhibit, if you would care to defer your ruling until that time, and I think at that time it will be clearer.

Justice Stephens: Very well.

By Mr. Steffen:

4991 Q. I show you Government's Exhibit No. 560, which purports to be a letter from Mr. Stromquist addressed to the Paragon Plaster and Supply Company, attention of Mr. Merriman, under date of July 9, 1928, and ask you to examine that, please, Mr. Hansen.

(Government's Exhibit No. 560 was handed to the witness.)

By Mr. Steffen:

Q. Can you identify that as Mr. Stromquist's signature, Mr. Hansen? A. You are asking me if I can identify it as Mr. Stromquist's signature?

Q. Yes. A. Yes.

Justice Stephens: Just a moment, Mr. Steffen, let me read it.

All right, you may proceed.

By Mr. Steffen:

Q. I notice in the lower left-hand corner of the second page it shows that a copy may have been sent to the Paragon Plaster Company. Do you recall having received a copy of this letter? A. It would be a little difficult for me to say that. We had frequent correspondence, and I would assume that I received it.

Q. I notice also it has reference to the American
4992 Hardwall Plaster Company, Utica? A. Yes.

Q. Could you tell us whether your company and the American Hardwall, and the Paragon Plaster and Supply Company were all buying from the Universal at this time? A. As far as I know, we were.

Q. Could you be more explicit on that, could you say that you were? A. We were.

Q. By "this time", I mean at about the time of this letter, July 9, 1928? A. That is correct.

Q. Now, I want to call your attention to the fact that in the third paragraph of the letter on the first page, it says, "The very lowest prices"—

Mr. Bromley: (Interposing) I object to reading from a document not in evidence.

By Mr. Steffen:

Q. Let me call your attention to the third paragraph, Mr. Hansen—I will, if I may, withdraw that question, and offer the exhibit, Exhibit 560, in evidence.

I do it with this statement, that the witness has testified, identifying the signature of Mr. Stromquist. It is an obvious quotation of prices for board sold at that time to the two Paragon companies and to the American
4993 Hardwall Plaster Company. In the third paragraph it refers to the—excuse me, I may not read that into the record—but it refers to prices "for your plant at Oakfield."

Now in response to Mr. Bromley's objection, which he made in connection with Exhibit 559, I would make these two points. In the first place, this evidence is offered to show the preliminary arrangements out of which grew the arrangements between Oakfield and the licensees in 1929, 1930, and following, and Mr. Hansen's understanding, and of course the Paragon Plaster Company's understanding, of how those arrangements were carried through, is of course material.

Specifically, however, it provides in the third paragraph there as respects to the sales to "your plant at Oakfield."

We have developed that Oakfield Gypsum Company was the company which was being operated in close conjunction, at least, with the three shareholding companies. The only officers, or the principal officers or managers of the Oakfield Gypsum Products Corporation were the principal officers of the three shareholding companies, and Mr. Hansen was an officer not only of the Paragon Plaster Company, but also was an executive of the Oakfield Gypsum Products Corporation.

A letter coming to Paragon and referring to "your plant at Oakfield" refers to their purchases either as respects Oakfield or Paragon.

So that it seems to me that within the strict definition, Oakfield was their manufacturing distributor, and here are some preliminary papers in connection with the purchases of board by a manufacturing distributor. And, as I say, the basis upon which they made these early purchases—in fact it is only a year before the license agreement went into effect—has a considerable bearing to show the basis upon which they were subsequently handling board for Universal and other licensees.

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Also, as a matter of fact, at this time, July 9, 1928, Universal was a licensee under the closed-edge patent, with the United States Gypsum Company.

Mr. Oliver: If the Court please, before you rule on this exhibit may we have an opportunity to see it?

Justice Stephens: Yes, you may see it.

Mr. Marshal, hand it to Mr. Oliver.

(The document referred to was handed to Mr. Oliver.)

Mr. Bromley: I make the same objection that I made to Exhibit 559, and call the Court's attention to the fact that there is no charge in the complaint that the resale prices of purchasers such as Paragon Plaster and Supply Company of Scranton, were controlled; and that this document is covered precisely by the ruling which this Court made with respect to the alleged control of the resales of the Witness Perry.

Furthermore, I object because there is no identification, no proper foundation laid, because this witness has not testified that this letter was sent to or received by the person to whom it was addressed. All he said was that he assumed that he got a copy of it. Certainly, that does not constitute a sufficient identification.

4995

Of the two, however, it seems to me the objection to materiality is the more important since we asked the Government to list in their bill of particulars who the manufacturing distributors were whose retail prices they said were controlled, and they listed them but did not put in either the Paragon Plaster, the Paragon Plaster and Supply, or the American Hardwall Company.

Justice Stephens: Are you offering this to prove price fixing in respect of the three companies, Paragon Plaster and Supply and the other two mentioned, other than Oakfield, each of which owned a one-third interest in Oakfield, or are you offering it to prove price fixing with respect to Oakfield—or both?

Mr. Steffen: I think it is with regard to both, although what we are offering it for primarily is with regard to Oakfield.

Justice Stephens: What do you say to that, Mr. Bromley, that in so far as Oakfield was concerned it was a manufacturing distributor? Was it mentioned in the bill of particulars?

Mr. Bromley: Yes. But how can this have any bearing on the Oakfield Gypsum Products Corporation? It isn't addressed to and was not sent to or received by the

4996 Oakfield Gypsum Products Corporation.

Mr. Steffen: I should like to ask the witness what I tried to ask him earlier, as to what he understood by the third paragraph there.

Mr. Bromley: This question was all gone into at the criminal case and these documents were excluded at the criminal case—

Mr. Steffen: (Interposing) I say that is not material.

Mr. Bromley: (Continuing)—because all this one has to do with, for instance, is the Paragon Plaster and Supply Company. It has nothing to do with the Oakfield Gypsum Products Corporation. The same argument was made in the criminal case and these exhibits were all excluded on the theory that there was no charge that the defendants were attempting to control the prices of the Paragon Plaster and Supply Company, the Paragon Plaster or the American Hardwall Company.

Justice Stephens: I have some difficulty in seeing, Mr. Steffen, even if the Court should draw the conclusion from the testimony of this witness that the four companies were one and the same, since you do not charge in the bill of particulars that there was any attempt to control the prices

of the three, other than Oakfield, how these exhibits can be material, or how this exhibit, rather, can be material.

We ruled with respect to Perry, we all agreed
4997 that the objection should be sustained and the motion to strike granted, there being no charge in the complaint of resale price fixing on plaster, board and other gypsum products by wholesalers, as distinguished from manufacturing distributors.

This seems to be a parallel situation.

Mr. Steffen: May I point out the lack of parallel, as I see it?

Justice Stephens: Yes.

Mr. Steffen: The Perry situation was very different, as I see it, in this respect, that Perry was simply doing a sales business. The Paragon Plaster and Supply Company and the Paragon Plaster Company, together with the American Hardwall Plaster Company, as I have developed rather fully, were organized to run the Oakfield Gypsum Products Corporation. The Oakfield Gypsum Products Corporation was a manufacturing distributor, and as I introduce further exhibits it will appear that the Oakfield Gypsum Products Corporation in a year or so became the sole purchaser of board, as a manufacturing distributor. Nothing of that sort occurred in the Perry case. There was no transition period in the sales of Perry, where he, for a period, served part as distributor and part as wholesaler. It was, in that case, just a plain case of a commission man or a salesman who was selling, and your Honors, I think, decided quite rightly that we had made no charge with respect to that.

4998 Now in this case we are not offering this, as I say, for purposes of proving that the defendants attempted to fix the prices at which the Paragon Plaster and Supply Company or the Paragon Plaster Company or the Hardwall Plaster Company sold.

We are offering this to show the basis upon which these sales were being handled in 1928, the year before the license agreements were generally effective in the industry, and it would be, therefore, very persuasive to determine how they handled it one year later.

Justice Stephens: Well, handled it in respect of whom, Paragon, the Paragon Plaster and Supply Company, the American Hardwall Plaster Company or Oakfield?

Mr. Steffen: The Oakfield Gypsum Products Corporation.

Justice Stephens: I don't understand that there is any objection to the exhibit with respect to Oakfield, based upon the contention that there is no charge of resale price fixing with respect to Oakfield. The objection is, as to Oakfield, that it doesn't relate to Oakfield.

Mr. Steffen: I point out the third paragraph, your Honor.

Justice Stephens: In other words, you contend that the phrase, "your plant at Oakfield" refers to the Oakfield Gypsum Products Corporation? I am asking you, Mr. Steffen, is that your contention?

Mr. Steffen: Yes, but I would like to ask this
4999 witness that question at some time, if you have any doubt.

Mr. Bromley: The unfairness of this shift of ground is illustrated by the fact that in every other instance in his bill of particulars, where he had a parent company and a subsidiary, where the charge was that we controlled the prices of both of them, he listed them.

For instance, take the Michigan Gypsum Company, listed in his bill of particulars as a manufacturing distributor. It had a parent, the Alabastine Company, and if you will look in the bill of particulars you will find not only the Michigan Gypsum Company listed, but also the Alabastine Company listed. Likewise, the Structural Gypsum Corporation, of which we have heard so much from Mr. Lenci, had a parent, the American Cyanamid Company. If you will look at the bill of particulars you will find the American Cyanamid Company listed.

Now, when we come to Oakfield there is no suggestion anywhere that they are going to charge us with having fixed the prices of the parents, as they do not list the parents. They list Oakfield but none of the parents. But it seems to me that that is very persuasive that this shift of ground constitutes such a surprise to us that it ought not to be permitted, and it is clearly immaterial to this case.

Justice Stephens: I don't understand this aspect of your objection, Mr. Bromley. You do concede that the bill of particulars did charge the fixing of resale prices
5000 of Oakfield, a manufacturing distributor. Now, if that is true, how can we exclude a letter which refers to the orders for the Oakfield plant, if it does?

Mr. Bromley: There isn't anything in this letter that has anything to do with the resale prices of Oakfield

Gypsum Products Corporation. You don't contend that, do you, Mr. Steffen?

Mr. Steffen: Oh, yes.

Mr. Bromley: Where is there any reference in this letter to the resale prices of Oakfield Gypsum Products Corporation?

Mr. Steffen: Would you like to hear from me on that?

Justice Stephens: Yes.

Mr. Steffen: I will call your attention to the third paragraph. I think I will read this very carefully for you:

"The very lowest prices we can make you on your orders for your plant at Oakfield, N. Y. are as follows:

Gypsolite Wallboard.....$21.00 per M. sq. ft.
Star Gypsum Wallboard.....$15.00 per M. sq. ft.
f.o.b. our plant Akron, New York."

Then the next paragraph, which is related thereto states:

"On orders for your plants at Syracuse, Utica, Bloomsburg and Scranton (three of those are three we have spoken of before, the two Paragon companies and the American Hardwall, and I don't know what Bloomsburg refers to), we will give you the following prices:

5001 Gypsolite Wallboard.....$22.00 per M. sq. ft.
Star Gypsum Wallboard.....$16.00 per M. sq. ft.
f.o.b. our plant Akron, New York."

Now, that is the price to the two Paragon companies and the American Hardwall Plaster at their Syracuse, Utica and Scranton plants, and also the price to them at their Oakfield plant, or rather to the Oakfield plant.

Now, it says, in the next to the last paragraph:

"In quoting carload prices to your dealer trade on Gypsolite Wallboard, you will please maintain our standard price of $25.00 per M. sq. ft."

That is certainly a provision ordering or requiring that resale prices be maintained not only on the sales made directly by Paragon to the dealer trade but also upon the sales made by Oakfield. We have carefully developed in the testimony here that those sales that were made at Oakfield were made by the Oakfield Gypsum Products Corporation, and it would be quite appropriate to write to Mr. Hansen, or to Mr. Merriman, or Mr. Eldred and say, inasmuch as they were also officers at Oakfield, "At

your plant we will sell you at such-and-such a price, and you will resell at such-and-such a price."

Now, it may be a misfortune that this letter was put together that way, that is, that it refers also to Paragon. But it distinctly refers to their sales, to the prices to be sold to them at Oakfield, and to the resale prices
5002 to be paid by them—reading rather loosely—either at Oakfield or at Syracuse, Utica and Scranton.

Justice Stephens: When you talk about "resale prices", do you mean the resale prices of the Paragon Plaster and Supply Company—and what are the other two?

Mr. Bromley: They are at the bottom of that letter, the second page.

Mr. Steffen: They are the three shareholder companies.

Justice Stephens: The Paragon Plaster and Supply Company, the Paragon Plaster Company, and the American Hardwall Plaster Company.

Mr. Steffen: Yes.

Justice Stephens: You contend that this letter tends to prove the fixing of a price at which they could resell their products either to Oakfield or to third parties.

Mr. Steffen: No, I am saying that the letter rather clearly says, as I read it, that these are prices quoted for shipment to "your plant at Oakfield, New York", meaning thereby of course the Oakfield Gypsum Products Corporation plant.

Then, secondly, "for your plants at Syracuse, Utica, * * * and Scranton"—meaning thereby the three parent companies.

Then the next to the last paragraph says, that is the next to the last paragraph on the first page, that
5003 on all business, whether sold by Oakfield Gypsum Products Corporation or by either of the two Paragon companies or the American Hardwall Plaster Company, the price shall be $25 per thousand square feet. That is the price to the dealer trade, either the parent companies' dealer trade or Oakfield's dealer trade.

Mr. Bromley: Well, I never heard a more unsound argument. The letter isn't addressed to the Oakfield Gypsum Products Corporation, either at the top of the page or at the bottom of page 2; and the third paragraph that he talks about beginning, "The very lowest prices we can make you on your orders for your plant at Oakfield, N. Y."—that is on Paragon's orders which Paragon may want to go to Oakfield.

The letter is not addressed to Oakfield, it wasn't received by Oakfield, and it wasn't sent to Oakfield, nor was a copy of it sent to or received by Oakfield.

Justice Stephens: The problem that troubles me about the admissibility of the letter, aside from the question of identification, is that if it purports to be a letter which fixes the resale prices of the Paragon Plaster Company, the Paragon Plaster and Supply Company, and the American Hardwall Plaster Company in their sales either to third parties or to Oakfield, it is not within the charge of the complaint; and if it is not that, what is there in there that indicates that it directed the resale price at which Oakfield should sell these items?

5004 Mr. Bromley: Not a thing.

Mr. Steffen: May I state this, your Honor?

The witness testified that there were purchases by the Oakfield Gypsum Products Corporation from Universal, as well as by Paragon. That was in his preliminary testimony. He stated that if Paragon, for example, had a mixed car order from a dealer in some other city, and they had to ship some neat plaster as well as some board, that they would send that order to Oakfield, their own subsidiary, and say, "Oakfield, ship to our customer one mixed car consisting of so much board and so much plaster."

And Oakfield, which had bought the board—and these were the arrangements we contend—would then invoice the board and make the sale clear through.

The point is that on that sale going to Paragon's dealer this letter says, "You shall charge $25 per thousand square feet."

Justice Stephens: Let me see if I clearly understand that argument. Your argument then is that in that class of sale concerning which Mr. Hansen testified, where Paragon Plaster and Supply, American Hardwall and Paragon Plaster Company would buy from Oakfield, Oakfield would bill those three companies just mentioned but would send the materials direct to the dealer?

Mr. Steffen: That is right.

5005 Justice Stephens: You contend that this letter tends to prove that when Oakfield did that, it had to do it at a price fixed by Universal under the license, or fixed by Universal, rather?

Mr. Steffen: That is right, and fixed under this letter.

Justice Stephens: And that that was a resale price of

Oakfield to Paragon, American Hardwall and Paragon Plaster and Supply, or to third parties—which?

Mr. Steffen: Well, it ran through—you see there is no case just like this when you have three parent companies and one subsidiary company and where they are using the subsidiary company as a producing company. They have that company buy certain board, and they control the Oakfield Gypsum Products Corporation completely, and they have that company, the Oakfield Gypsum Products Corporation buy board, and then, in making sales to dealers, the parent companies would say, "Ship directly to the dealer to whom we have sold; invoice us and we will invoice the customer."

On that type of a transaction which has definitely to do with the manufacturing distributor, it is provided in this letter that those sales must be at $25 per thousand square feet, that is that the dealer would have to pay a $25 price.

That, we contend, is a very definite showing of control of a manufacturing distributor's prices. I would like to make one other point—

5006 Justice Stephens: (Interposing) What puzzles me, Mr. Steffen, is that this paragraph on which you rely says, "The very lowest prices we can make you on your orders for your plant at Oakfield, N. Y. are as follows". That does not sound like resale price fixing to me. It sounds like the price which either the Paragon Plaster and Supply Company or Oakfield would have to pay Universal when it bought goods.

Mr. Steffen: That is right.

Justice Stephens: What has that to do with the resale price?

Mr. Steffen: That is the paragraph that says that when you buy at Oakfield—and what the writer of this letter evidently was doing was saying, "Well, here is a jammed-up situation with three parent companies and one subsidiary, and we know that all four companies are doing business"—and what Stromquist says is, "Now, when you buy from us these are the prices at which you shall buy." That is in the first paragraph, to which I referred. He is saying, "If you are going to buy from us ("you", speaking loosely), you at your plant at Oakfield will pay $21 per thousand square feet; and you, at Utica, Syracuse and Scranton, will pay $22 per thousand square feet."

That is the purchase price from Universal.

Then, the next to the last paragraph on that page
5007 says, in effect, "As to both types of purchases, whether at Oakfield, Syracuse, or elsewhere, you will sell to dealers at a price of $25."

Now, what we have developed here is the way this transaction would go through would be that Universal would sell to Mr. Hansen's plant at Oakfield at $21 per thousand. Then when the sale by Oakfield is made, if made directly it would be made at $25. If it was made through the medium of Paragon, and then to the dealer, again it would be made at $25.

Now, may I make my two points, your Honor?

We offer it first, as I just suggested, as showing a definite control of a resale price by a named manufacturing distributor, the Oakfield Gypsum Products Corporation.

We offer it second for the inferential value that it will have as showing the understanding which Mr. Hansen had, which Mr. Merriman had, and which Mr. Eldred had, concerning these purchases from Universal, and concerning their requirement that it would be resold at a definite price.

Now, it is true that that might be regarded as an attempt to control, and I think it was an actual control of Paragon's resale price. We don't offer it because that is charged in the complaint; we offer it, however, to say that if they were controlling Paragon's resale price, and Paragon was so closely associated with Oakfield that that inferen-
tially shows what the arrangement was in the en-
5008 suing years. The fact of the matter is that in some of the later years they just went along on a general industry understanding that they would have to abide by resale prices, and this is one of the very early letters which indicated the set-up which existed prior to some of the later letters which we will offer.

Justice Stephens: Mr. Bromley, what do you say to Mr. Steffen's contention that the next to the last paragraph on page of proposed Exhibit 560, "In quoting carload prices to your dealer trade on Gypsolite Wallboard, you will please maintain our standard price of $25 per M. square feet"—applies to Oakfield?

Mr. Bromley: I say that it clearly does not apply to Oakfield. It says, "to your dealer trade". That must mean Paragon Plaster and Supply Company's dealer. That is the company to whom the letter is addressed. It is not addressed to Oakfield and no copy of it was ever sent to Oakfield. The letter shows very clearly what "your

dealer trade in Gypsolite Wallboard" means, all the way through. The "your" refers to Paragon Plaster and Supply Company.

Now, you can extend it to at least two other companies by virtue of the fact that the endorsement at the end of the letter shows that a copy of this letter went to two other companies, the American Hardwall Plaster Company, and to the Paragon Plaster Company, but it did not go to Oakfield.

How in the world they can say that this was a
5009 request of Oakfield that Oakfield, in reselling, maintain Universal's prices, I do not see. It may be a request of the Paragon Plaster Company, and it may be a request of the American Hardwall Plaster Company, and of the Paragon Plaster and Supply Company, but you cannot get it beyond that.

As far as it being strange that a person should buy board, a company should buy board, like Paragon, and have the supplier send it to Oakfield, or direct to the customer, we have had a lot of testimony about that. That is what happened between Kelley and Structural. Structural would buy from Kelley, and Kelley would make the delivery to Structural's customer. There is nothing strange about that.

Justice Stephens: Is there anything further on either side?

Mr. Bromley: No, sir.

Mr. Steffen: Before your Honor rules may I develop further from the witness his understanding of this arrangement, what this letter would mean to him and what "your plant at Oakfield" means?

Justice Stephens: Well, the exhibit is not identified yet. It seems to me it ought to be in evidence, at least, and under examination by someone who received it and knows about it, before it is to be given an interpretation contrary to its flat meaning.

We are all agreed, Mr. Steffen, that so far as
5010 the letter purports to be an attempt to fix the resale prices of Paragon Plaster and Supply Company, American Hardwall Plaster Company, and the Paragon Plaster Company, it is not admissible because there is no charge to that effect in the complaint, that there was any resale price fixing so far as those three companies were concerned.

Mr. Steffen: We agree with that.

Justice Stephens: In so far as concerns the attempted use of the exhibit to show a resale price fixing of Oakfield in its sales, it seems to us that the letter perfectly clearly, on its face, does not apply to Oakfield in respect of the dealer trade which is mentioned in the next to the last paragraph on page 1.

It apparently might apply to Oakfield in the third paragraph in respect to orders for Oakfield from Universal. But how it can be said by any strain of the instrument to apply to resales by Oakfield, when in the next to the last paragraph on the first page it says, "To your dealer trade", in a letter addressed to the Paragon Plaster and Supply Company, with copies to the American Hardwall Company and the Paragon Plaster Company, we just aren't able to see, how it has any bearing on Oakfield's resales.

We do not of course deny you the opportunity to prove by proper exhibits that there was resale price fixing in respect of Oakfield, but we don't see how this exhibit proves it.

Mr. Steffen: I don't know that it proves it but—

5011 Justice Stephens: Perhaps I should have said—tends to prove it.

Mr. Steffen: I would like in the morning, if I may, to ask Mr. Hansen concerning his understanding of the arrangement, and what he understood, "The very lowest prices we can make you on your orders for your plant at Oakfield"—might mean.

Mr. Oliver: I would object to that, because this witness stated that he only assumed it was received, and now to ask him to look at it and try to construe language—

Justice Stephens: (Interposing) Well, certainly that question cannot be asked unless the exhibit is identified and the witness is shown to have some familiarity with the transaction. If you can identify it we will consider then whether or not this witness is permitted to show what it is and what the trade understanding of these four companies was with respect to it.

Can you identify it by someone else and can you bring someone else who can show some familiarity with this correspondence?

Mr. Steffen: We have identified it by showing the correctness of the signature; and the second point of identification is that we took it from, or it came from the files, of Universal—no, I am mistaken, we took it from the files of Paragon. In any event, it was supplied by one of those com-

panies, I think it was the Paragon Plaster and Sup-
5012 ply Company. I can verify that in the morning.

Justice Stephens: Are you familiar with Mr. Stromquist's signature?

The Witness: Yes, sir.

Justice Stephens: But you don't have any recollection of having received this letter yourself?

The Witness: Judge—

Justice Stephens: (Interposing) I am not asking you to strain your recollection or suggesting that you ought to remember it. I just want the fact.

The Witness: Well, if you speak of this particular letter, I have got to say no. I have received carbon copies of letters from time to time, but to say, from my memory, that I know I got this carbon copy, I cannot.

By Mr. Steffen:

Q. This was the usual way of receiving information from Universal? A. It was the custom to send a letter to one company, and carbon copies to the other two.

Q. And was there a special letter sent to Oakfield Gypsum Products Corporation? A. No. We maintained no office at Oakfield other than a mill office.

Q. So it would be normal for the letter to reach you at either Scranton, Utica, or Syracuse? A. Letters
5013 addressed to the Oakfield Gypsum Products Corporation would have been sent to one of the three points, that is, correspondence from Universal.

Q. And a letter that referred to matters which had to to do with Oakfield as well as Paragon, might be sent simply to Paragon, is that right? A. Repeat that, will you?

Q. I say that a letter which might have to do with both Oakfield Gypsum Products Corporation matters and Paragon Plaster and Supply Company matters, might be sent simply, as this one appears to have been, to the Paragon Plaster and Supply Company.

Mr. Bromley: I object to that as speculative.

Mr. Steffen: He can tell what the routine of his office was.

Justice Stephens: That wasn't the question. You asked him how it might be sent. If you want to develop what the practices between the three companies were, you can do that, but we will have to do that tomorrow.

Mr. Johnston: If the members of the Court are not going to be using those exhibits tonight, might I borrow a set?

Justice Jackson: You may borrow mine.

Mr. Johnston: There is one other matter. This Exhibit 559 refers to a letter of January 21, and Exhibit 560 refers to a letter of June 13. I would like to see those over the recess tonight, if I may.

5014 Justice Stephens: If they are available, let them be supplied to defendants' counsel so that the correspondence will be understood.

(Whereupon, at 4:10 p. m., a recess was taken until 10:00 o'clock a. m., Wednesday March 22, 1944.)

5015 IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA,

Plaintiff,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS,

Defendants.

Seventh Floor,
Internal Revenue Building,
Washington, D. C.,
Wednesday, March 22, 1944.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

APPEARANCES:

(Same as heretofore noted.)

5016 Justice Stephens: Page 5176, line 14, the word "but" should be stricken out, and the word "that" written in in its place.

There was one point in the morning session that I would like to have an explanation of, if it can be explained without recalling Mr. Lenci, as I suppose it probably can be by agreement. At page 5217, lines 6 and 7, this answer appears:

"A. That is correct, and that was deducted from
5017 the amount we got at destination."

The previous question was:

"Q. • • • But so far as the freight which was paid by your customers was concerned, they paid freight to the railroad based on the arbitrary weight of the board which had been agreed upon prior to that time between you and the railroad? A. That is correct, and that was deducted from the amount we got at destination."

I wasn't quite clear, and I think the past testimony will show it, whether or not the freight was ultimately borne by the customer or by the manufacturer. Apparently the customer paid it, but was it later deducted?

Justice Jackson: The portion absorbed by the manufacturer was given as a credit, as I understand it.

Mr. Bromley: That is right.

Justice Stephens: The portion absorbed by the manufacturer was given as a credit, but not the entire freight?

Justice Jackson: No, not the entire freight.

Mr. Knuff: The way I understand it was handled was that the invoice was sent out by the company, showing the board plus the freight.

Justice Stephens: By "plus the freight", you mean the freight as indicated in the bulletins?

Mr. Knuff: No, the actual freight. Then, if the
5018 buyer paid that, when he would settle with the company he would claim the amount of freight that he paid as a credit against the invoice that the company sent him.

Justice Stephens: The entire amount that he paid?

Mr. Knuff: Yes, that is my understanding.

I don't think the customer ever knew anything about

freight absorption at all. That was a matter that the manufacturer handled himself. A customer never knew whether the freight was absorbed or wasn't absorbed.

Justice Stephens: But the price made to the customer was the mill base price plus the freight to destination from the nearest mill base? That was the price announced to the customer and the price he paid?

Mr. Knuff: Based on the bulletin shipping weight.

Justice Stephens: That is right. And the customer paid the whole amount of that?

Mr. Steffen: That is correct.

Justice Stephens: And then deducted what?

Mr. Knuff: He would deduct the amount of the freight that he had paid to the railroad company, from the invoice.

Justice Stephens: And that would be the freight from mill base to destination?

Mr. Knuff: That is right.

Justice Jackson: That answer is correct at lines 6 and 7, then?

5019 Mr. Knuff: Yes.

Justice Stephens: Is that right, Mr. Collins?

Mr. Collins: As I understand it, the invoice from the manufacturer to the customer will show the mill base plus the freight from the nearest mill to the point of destination. Now if a manufacturer has a mill further away, he will ship the board and the freight on that board will be in excess of the freight specified on the invoice.

Justice Stephens: That is right.

Mr. Collins: The customer pays that freight and deducts that entire amount from the invoice when he remits to the manufacturer.

Justice Stephens: That is what I thought, but I wanted to be certain.

Justice Jackson: Then the answer is correct on lines 6 and 7?

Mr. Collins: Yes.

5022 Justice Stephens: Page 5254, I want to ask a question. In the question commencing at line 6, which reads:

"Q. And when you say 'excessive discount', you mean a discount in excess of the amount provided for in the consent, to-wit, 15 percent on board and 12-1/2 percent on lath; is that right?"

Now there the discussion had to do, as I remember it, Mr. Bromley, with the discount allowed to a manufacturing

distributor, and I am puzzled by the use of the phrase "excessive discount". I thought that under the bulletins, if consent was given to sell to a manufacturing distributor, he got a discount of a fixed nature; but that if he was not a manufacturing distributor, or ceased to be one, he didn't get any discount at all—so that it wasn't a question of excessive discount, but a question of the existence or nonexistence of any discount. Maybe I am misinformed about that.

Mr. Bromley: I think this question has reference to a complaint which was made against Kelley, which was that while Kelley, in his sales to Structural, was entitled to give a discount to Structural because Structural was a manufacturing distributor, instead of making the discount 15 percent, merely, Kelley made it more than that.

5023 Justice Stephens: I see.

Mr. Bromley: That was a price reduction to Structural, then, contrary to the bulletins.

Justice Stephens: That clears that up in my mind.

I have no other questions.

Justice Garrett: I would like to ask Mr. Steffen a question.

On page 5299, Mr. Steffen, in line 21, should the word "not" be inserted before "charged"? Perhaps that is stated like you wish to state it.

Mr. Steffens: I think it is all right, Your Honor. The idea was that we didn't offer it to prove that the defendants were fixing the resale prices of jobbers.

Justice Garrett: All right.

Justice Stephens: Now, in order to clarify the record with respect to this proposed Exhibit 560, I will state what my own views are concerning it—

Mr. Steffen: (Interposing) Your Honor, may I interrupt and ask, before there is a final ruling, that we have some further opportunity to explain the situation—

Justice Stephens: (Interposing) I wasn't about to make a final ruling. I was about to state my own views, and ask my colleagues to express theirs, as I wasn't entirely certain whether we were in full agreement, but not with the idea of making a final ruling. We will hear you fur-

5024 ther upon it before a final ruling is made.

Mr. Steffen: I have some further questions and some further exhibits that may clarify the matter somewhat.

Justice Stephens: My own view is that Exhibit 560 is not admissible to prove resale price fixing by Paragon Plas-

ter and Supply, American Hardwall Plaster Company, or Paragon Plaster Company, because there is no charge in the complaint or bill of particulars that there was resale price fixing so far as those companies were concerned.

So far as Oakfield is concerned, it is my personal view that Exhibit 560 is not yet identified sufficiently to be admitted, for two reasons:

In the first place, there is no showing yet—I suppose this can easily be supplied—that Stromquist was an official or agent of Universal; and, second, there is no showing yet that the letter came out of the possession of the person to whom it was directed, or the firm to which it was directed, to-wit, Paragon Plaster and Supply Company.

I think if the showing is merely that it came out of the files of one of the other two companies, that isn't sufficient to prove that it reached the attention of the company against whom it is now offered, to-wit, Paragon Plaster and Supply, in respect of Oakfield, in connection with whom it is now offered.

I am of the view also that even if Exhibit 560 can
5025 be identified, on its face it doesn't tend to prove—and therefore isn't relevant or material—anything in respect of resale price fixing by Oakfield.

However, I think it might be that the witness, who is familiar with the practice and correspondence between these companies, might be interrogated upon the subject of what the letter does mean, if it is not clear on its face. If it had a trade meaning, it can be explained, just as the bulletins have been explained in respect of their trade meaning.

I don't quite understand, however, I will say frankly to Government counsel, why it is necessary to take so much time on the exhibit, although of course I don't assume to tell you how to try your own case. However, I should think if there was probably a resale price fixing by Universal and Oakfield, on sales by Oakfield, that this witness, or other witnesses in his situation, would have known about it and could be asked about it directly.

Those are merely expressions of my views as presently in my mind. I am open to conviction or further argument upon them. I am not foreclosing you from being heard or from asking the witness further questions.

Perhaps my colleagues would like to express themselves. I am not quite sure what their views are.

Justice Garrett: Well, briefly, by reason of the
5026 relationship shown to exist between this witness, or his company, Paragon, and Oakfield, and in view

of the witness' statement that it was customary for correspondence addressed to Oakfield to be sent to one of these companies and carbon copies of the same sent to the other companies, a relationship is shown which would render admissible, for whatever it would be worth, a letter properly identified in other particulars, as against Oakfield.

I agree that the letter has not yet been sufficiently identified in other particulars to render it admissible at this stage of the proceedings. I, of course, express no opinion whatever as to how much weight it is entitled to, if admitted. That is a question that will have to be determined later.

That is all I have to say about it.

Justice Jackson: You are going to further interrogate this witness, are you not?

Mr. Steffen: That is right.

Justice Jackson: I don't see any sense in expressing an opinion right now, and I haven't any right now.

Mr. Steffen: Mr. Hansen, will you take the stand?

Thereupon, EMIL HANSEN the witness on the stand at the time of adjournment, resumed his testimony as follows:

5027 Direct Examination (resumed)

By Mr. Steffen:

Q. Mr. Hansen, yesterday you were looking at Exhibit 560, which was dated July 9, 1928. I think you might be shown that now, please.

(Exhibit 560 handed to the witness.)

By Mr. Steffen:

Q. Do you recall, Mr. Hansen, that you received other letters from the Universal Gypsum & Lime Company similar to this, concerning prices of board?

Mr. Bromley: I object to that as immaterial and incompetent. In view of the nicety of the distinctions with which we are dealing, I don't think it is proper to ask him if he received other letters similar to this.

Mr. Steffen: I will show you what has been marked as Government's Exhibit 561—

Justice Stephens: (Interposing) The objection is sustained as to that question, so that the record may be clear—but you may present this additional exhibit. Is that the letter of June 3?

Mr. Steffen: No, Your Honor, I didn't anticipate the difficulty that we ran into yesterday, and I am now forced to show Mr. Hansen certain other correspondence, which is relevant and which is very material as respects the relationship between the companies.

5028 Justice Jackson: Does anybody have copies?

Mr. Steffen: No, I am sorry, no one has copies.

Justice Stephens: Then we will have to examine them as they are offered.

(The document referred to was marked Government's Exhibit No. 561 for Identification.)

Justice Stephens: You read it first, Mr. Witness.

(Witness examines Exhibit 561 for Identification.)

Mr. Steffen: Exhibit 561 purports to be a letter dated February 4, 1929, signed by Mr. Stromquist and addressed to Mr. E. L. Merriman, Paragon Plaster and Supply Company, with a reference to Mr. Eldred and Mr. Emil Hansen, and others, at the top of the letter, as receiving copies.

(Exhibit 561 for Identification handed to the Court for examination, and a copy also handed to defendants' counsel for examination.)

By Mr. Steffen:

Q. Have you examined Govenment's Exhibit 561, Mr. Hansen? A. Have I examined it?

Q. Yes. A. Yes.

Q. And is that Mr. Stromquist's signature? A. I would say so.

5029 Q. Do you recall having received this copy? A. No. This was 16 or 17 years ago. I just couldn't recall this specific copy.

Q. Do you have any reason to doubt that it was a copy that your company received?

Mr. Bromley: I object to that as incompetent because calling for a conclusion.

Justice Stephens: Sustained.

Mr. Steffen: I will show the witness two other items.

By Mr. Steffen:

Q. I now show you what has been marked Government's Exhibit 562—

Justice Jackson: (Interposing) We do not have that, either?

Mr. Steffen: That is right, Your Honor.

(The document referred to was marked as Government's Exhibit No. 562 for Identification.)

(Exhibit No. 562 for Identification was handed to the witness, and a photostatic copy to the Court, for examination, after which the photostatic copy was handed to defendants' counsel for examination.)

Mr. Steffen: I also hand to the Court a copy of Exhibit 563 for Identification, while the witness is looking at Exhibit 562 for Identification, and call your attention to
5030 the letterhead and the printing in the upper right-hand corner. It will be offered for that only.

(The document referred to was marked as Government's Exhibit No. 563 for Identification.)

(Photostatic copy of Exhibit No. 563 for Identification handed to the Court for examination; then handed to Defendants' counsel for examination.)

Mr. Steffen: I would like to show the witness what has been marked as Government's Exhibit 563, which is a letter dated April 1, 1940, on the letterhead of the Paragon Plaster Company, and which contains a reference to the General Offices at Syracuse and the mine and mill offices at Oakfield, New York, in the upper right-hand corner.

(Exhibit 563 for Identification handed to the witness.)

By Mr. Steffen:

Q. Now, Mr. Hansen, looking at Government's Exhibit 562, which is the Ebsary Gypsum Company letter, can you identify that as a letter signed by Mr. Lenci? A. Yes.

Q. Is that a letter that was received by you? A. I would say so.

Justice Jackson: I don't believe Mr. Johnston hears either counsel or the witness.

5031 Mr. Steffen: I am sorry.

Justice Stephens: Read the last two questions and answers in a loud, clear tone of voice, Mr. Reporter.

(The record was read by the reporter as requested.)

By Mr. Steffen:

Q. Now, looking at Government's Exhibit 563, Mr. Han-

sen, can you tell us whether that is the letterhead that your company used, the Paragon Company used? A. Yes, sir.

Q. And for what period of time did you use that letterhead? A. Oh, I would say that we had used that general letterhead for a period of ten years.

Q. And in the upper right-hand corner it says that you have offices at Syracuse and also a mine and mill at Oakfield? A. That is right.

Q. And what did you mean to imply by that? A. We, as one-third owners of the Oakfield Gypsum Products Corporation, for the purpose of maintaining prestige for the Paragon Plaster Company, claimed to be manufacturers, and therefore said that we had a mill at Oakfield, that being the producing unit for the Paragon Plaster Company at the time.

5032 Q. And it was also the producing unit for the other Paragon company and for Hardwall, is that right? A. That is right.

Q. And that mill was what mill? A. The mill of the Oakfield Gypsum Products Corporation.

Q. Which you were a one-third shareowner in? A. That is right.

Q. Did the Oakfield Gypsum Products Corporaton have a sales office or a general office at Oakfield, in 1928? A. Not a sales office, just a mill office.

Q. And if there were to be purchases, say, from the Universal Gypsum Company, of board, from what office would they be handled?

Justice Stephens: Purchases from whom?

Mr. Steffen: From Universal Gypsum Company, for example, for account of Oakfield.

The Witness: They would probably have been made from the Syracuse office.

By Mr. Steffen:

Q. That is, your office, the Paragon Plaster Company's office, in Syracuse? A. Yes, sir, orders would have been issued from there.

Q. Would you have personally handled that type of order? A. I would have directed it, after consulta-

5033 tion with my two associates as to where business was to be placed.

Q. What do you mean by that? A. Well, I mean as to what company we were placing an order with; and when I say "we", I mean the Oakfield Gypsum Company.

Q. And the Oakfield Gypsum Company, on this type of transaction, would be the buyer from Universal? A. That is right.

Q. And you, or your office, the Paragon office, would place the order with Universal?

Mr. Bromley: I object to that. He has just said that it was Oakfield Gypsum Products that would place the order with Universal, not Paragon.

Justice Stephens: That is correct, Mr. Steffen.

Mr. Steffen: I fell into the same error, I think, that probably the other persons, whose correspondence we have shown here, have—

Mr. Bromley: (Interposing) I don't think that that is a fair inference, and I object to that statement. There is nothing in the record so far to support that.

Justice Stephens: There is nothing in the record to support that. I think it should go out.

Mr. Bromley: While we are on the subject, could we have the witness tell us who he meant when he said, in answer to Mr. Steffen's question, he conferred with
5034 his two associates?

By Mr. Steffen:

Q. Who did you mean by that? A. Mr. Merriman and Mr. Eldred.

Q. Mr. Merriman was with what company? A. With the Paragon Plaster and Supply Company.

Q. And Mr. Eldred was with American Hardwall? A. Yes.

Justice Stephens: When you speak of conferring with your two associates as to Oakfield's purchases, or purchases from Universal for Oakfield, you mean your associates on the Executive Committee of Oakfield?

The Witness: I didn't get that, Judge.

Justice Stephens: When you refer to your two associates, as you have just been referring to them, do you mean your two associates on the Executive Committee of Oakfield?

The Witness: That is right.

Justice Stephens: I see.

By Mr. Steffen:

Q. Well, let's assume, Mr. Hansen, that from time to time the Oakfield Gypsum Products Company would buy

board from Universal, during this period in 1928 and 1929; is that correct? A. Yes, sir.

Q. And where would the order start from?

5035 A. From the Syracuse office.

Q. And you would place the order with Universal, you personally, after consulting, as I understand it, with your two associates? A. I would direct the placing of it.

Q. Thank you. And the order would be placed on forms, would it? A. Yes.

Q. And what name would appear on those forms? A. The Oakfield Gypsum Products Corporation forms.

Q. And the correspondence concerning the Oakfield business would be returned to the Oakfield Gypsum Products Corporation at the Paragon Plaster Company's office at Syracuse, would it? A. Well, it was also the Oakfield office. Our Oakfield stationery would show an office at 300 West Water Street.

Q. 300 West Water Street is the address of the Paragon Plaster Company, also? A. That is right.

Q. Now referring to Government's Exhibit 561, which I think you have before you, Mr. Hansen, can you tell us what you understood by the statement, "On shipments to your plant at Oakfield, N. Y."?

Mr. Bromley: I object to that, first, because it calls for an interpretation of a writing, which doesn't need

5036 any; and, second, because this document is not in evidence.

Justice Stephens: The document not yet having been offered or received in evidence, we haven't reached the point where its meaning is to be considered. You must first offer it in evidence and see if it is qualified to come into evidence. Then if there is any doubt about its meaning, or if it means something different from what it states on its face, in the trade, we will consider whether you can go into that.

The objection is sustained, as presently made, on the present state of the record.

Mr. Steffen: I will now offer Government's Exhibit No. 561.

Justice Stephens: Mr. Marshal, hand the exhibit back to the Court again.

(Exhibit No. 561 for Identification handed to the Court.)

Justice Stephens: Does the record show from whose files this came, Mr. Steffen?

Mr. Steffen: We can state to the Court, and we verified that last night, that these papers that we are now offering, or that we are now presenting before the Court—and I mean by that Exhibits 560, 561 and 562—came from the files of the Paragon Plaster Company. Exhibit 563 was, of course, addressed to us.

5037 Justice Stephens: Do you wish to be heard as to whether that is sufficient identification? It appears now in the record, I think, Mr. Bromley, that this witness identifies the signature of Stromquist,—I don't think he has yet testified who Stromquist was, in connection with Universal,—and it also appears from the statement of counsel, unless that is disputed, that this letter was taken from the files of this witness' company, the Paragon Plaster Company.

Mr. Bromley: I do not dispute that. I think, however, since the witness has testified that he can not say that he received it, it still has failed of identification; and, of course, I object to it on the ground of materiality.

Justice Stephens: Well, we are not reaching that yet.

Mr. Bromley: Yes, sir.

Mr. Steffen: May I be heard, Your Honor?

Justice Stephens: Yes.

Mr. Steffen: Granting that the item has been identified, so far as Mr. Stromquist's signature is concerned—and I doubt if there will be any dispute as to his reputation of the company, that has not been raised seriously yet—

Justice Stephens: (Interposing) Let's clear that up. Do you know who Stromquist was, in connection with Universal?

The Witness: Yes.

Justice Stephens: Who was he?

The Witness: He was the Eastern Sales Manager.

5038 Justice Stephens: Very well, that is out, now. What is the rest of your statement?

Mr. Steffen: Waiving any question of materiality for the moment, we would offer it for the purpose of showing that there were price quotations coming to the Paragon Plaster & Supply Company, and to each of the other companies, and that they were quoted prices not only to the Paragon companies and Hardwall, but to "your plant at Oakfield", and that "your plant at Oakfield" could only mean the Oakfield Gypsum Products Corporation.

Now I think it puts us in an impossible position not to permit us to ask what is meant by that. It is merely a preliminary question—

Justice Stephens: (Interposing) I am sorry, Mr. Steffen, but you said a moment ago you were waiving the question of materiality for the moment. Are you asking this question for the purpose of identifying the document?

Mr. Steffen: These three exhibits are presented for purposes of showing that the term appearing in Exhibit 560, which is the exhibit we had last night, "The very lowest prices we can make you on your orders for your plant at Oakfield, N. Y.", is an ambiguous statement. At least, it seems to have caused doubt in the mind of the Court as to what was meant by "on your orders for your plant at Oakfield", and we have now presented for the Court Ex-
5039 hibits 561, 562 and 563—and 561 and 562, particularly, are letters sent to the parent companies, and relate to "your plant at Oakfield", and have to do with prices and sales conditions.

So it would seem from those two letters, if I may have the witness state what is understood by "your plant at Oakfield"—and I think he has substantially clarified that—that it means the Oakfield Gypsum Products Corporation.

Justice Stephens: I don't understand that we have reached that question yet, Mr. Steffen. Let me state what I think the point of view of the Court is in respect of its duties and rulings on these questions of evidence.

In the first place, you have got to look back and see what the issues are, what issue this is offered under. Well, it is offered to prove, as I understand it, that there was resale price fixing by Oakfield in sales, in connection with Universal, of products purchased from Universal. Now that is what it is offered to prove. Whether it proves that or not, or tends to prove it, depends upon the content of the document, and that has to do with its relevancy and materiality, which are questions of logic and probative force and have nothing to do with identification.

Before we reach those questions, the question is whether or not this document was sent out by Universal and received by Paragon. Now that is the only question we have got before us, before we reach the question of mate-
5040 riality and relevancy. I don't see that the meaning of the phrases in the document has anything to do with determining whether or not it was sent out by Universal and received by Paragon, this man's company.

Mr. Steffen: I am sorry, I thought that Your Honor had gone on to the question of what the letter meant, and this evidence was to show that it was a letter directed to affect or control or specify the prices at which Oakfield would resell.

Justice Stephens: The first thing you have to show is as to whether or not this was sent out by Universal and received by Paragon, the company of which this witness is an officer. Now that is the only objection before us at the present time, that it hasn't been sufficiently identified as a letter sent out by Universal and received by Paragon.

Isn't that the only objection you are raising now, Mr. Bromley?

Mr. Bromley: Yes, sir.

Justice Stephens: As to that, do you wish to be heard?

Mr. Steffen: I certainly do, Your Honor.

I would say that on this matter of materiality, which I think is immediately—

Justice Stephens: (Interposing) We haven't reached the question of materiality. We are talking about identification, first. Its materiality and relevancy will reach
5041 the threshold of the Court's consideration when you first identify the document as a document sent out by Universal and received by this witness' company, Paragon. We don't say you haven't identified it, we are just giving you an opportunity to be heard.

Mr. Steffen: On the matter of identification, we have identified the signature, and we have further stated to the Court—and Mr. Bromley agrees—that it was taken from the files of the Paragon Plaster Company.

Now this is presented as a declaration on the part of the Universal Gypsum & Lime Company by Mr. Stromquist. It is in furtherance of the conspiracy, as we have alleged it in the complaint. Paragraph 45(e) says that the defendants have violated the Sherman Act by "concertedly inducing and coercing manufacturing distributors to resell • • • ". These are letters which are addressed, in the first place, to the three parent companies. Even though they were never received at all by the companies, they would be declarations of an alleged co-conspirator in furtherance of the conspiracy.

We have shown, however, that they were received, and they were taken from the files of the Paragon Plaster Company.

That, I should say, is sufficient, certainly, to show that

the papers are properly identified; and, moreover, that they are material, unless there is some doubt as to
5042 whether it affects the Oakfield Gypsum Products Corporation, and on that I would reserve the right to be heard later.

Justice Stephens: What do you say about identification, Mr. Bromley? I thought we had ruled, on a number of occasions, that where a signature is identified by a person who knows the handwriting of the purported signer and knows his connection with the company for which he purports to sign it, and where it has been taken out of the files of the company of which the witness is an officer, that that is sufficient circumstantial identification that the exhibit was sent and received by the purported sender and receiver.

Mr. Bromley: I don't believe that rule has ever been applied by this Court in a situation where the files talked about were not files of a defendant or an alleged co-conspirator. These files of the Paragon Plaster & Supply Company, or the Paragon Plaster Company—I am not sure which—are files of somebody who is not a defendant, not even an alleged co-conspirator.

Justice Stephens: Does that go to the question of identification? Doesn't that go to the question whether the document is binding upon Oakfield? I think my colleagues agree with me that we are not going to receive this in evidence to prove resale price fixing or as tending to prove resale price fixing by the two Paragon companies or the American Hardwall, because that is not within the
5043 bill of particulars.

But now the Government is trying to prove resale price fixing by Oakfield. The claim is apparently that this letter meant, to the sender, and to the receivers, who were parents of Oakfield, something different from what it says on its face, with respect to resale price fixing by Oakfield. We haven't reached the question of what it means. We have reached the question as to whether or not it has been identified as a letter between the sender and the receiver. What difference does it make, so far as identification is concerned as distinguished from relevancy or its capacity to prove something against Oakfield, as to whether or not Paragon is a defendant?

Mr. Bromley: I think where a defendant produces a document from its files, to the Government, that that is a binding authentication, to some degree, of its genuineness and the fact that it was received, probably. But how can

that rule apply to somebody who is not a party to the suit? How can that apply against us?

Justice Stephens: I may be wrong about it, but my idea was that evidence that a document is produced from a certain person's files to whom, on its face, it is addressed, is merely a matter of circumstantial evidence tending to show that it was received, and that it doesn't have to do with an admission, but maybe I am mistaken about that.

5044 Maybe the reason underlying the Court's rulings ought to be, with respect to the production of a document by a defendant, that it is more than mere circumstantial evidence, that it is in the nature of an admission that he received it.

Mr. Bromley: That is my understanding of the rule. I may be wrong.

Justice Stephens: We will take a recess for a few moments.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

5045 Justice Stephens: We are of the view that the document is identified. Our idea, Mr. Bromley, is that the rule with respect to identification, which we have been following, is a rule of circumstantial evidence and not a rule of admissions.

If a document is supposed to be addressed to a particular person, and is found in his possession, even if he doesn't give it up voluntarily—which he did in this case—and it is shown to have proceeded from the source from which it purports to proceed, we think that is some evidence that it has been received by the purported recipient.

We therefore rule that the document is identified.

Since we have separated those questions of materiality and relevancy on the one hand, and identification on the other, and have confined the first ruling to identification, do you wish to be heard further as to whether or not, on its face, this document Mr. Steffen, tends to prove anything in respect of resale price fixing by Oakfield?

Mr. Steffen: Yes, I think perhaps I had better make a statement.

As your Honor has stated, and as we agree, we are not offering this at all for the purposes of showing resale price fixing by the Paragon Plaster Company or the Paragon Plaster and Supply Company, or the American Hardwall Plaster Company. They are jobbers, in this sense;

5046 and we did not charge in the complaint that there

was any attempt by the defendants to fix the resale price by jobbers.

But we did charge in Paragraph 45(e) that the defendants violated the act by, "concertedly inducing and coercing manufacturing distributors to resell", and so forth.

I think that the letter—and I am now speaking with regard to Exhibit 560—on its face indicates—.

Justice Stephens: I thought we were talking about Exhibit 561 at the present time. We haven't ruled on the identification of Exhibit 560. We are ruling on 561. That is the one that all this argument has been about.

Mr. Steffen: Well, I think the argument—

Justice Jackson: (Interposing) Was Exhibit 560 taken from the files of Paragon?

Mr. Steffen: Yes, your Honor.

Justice Stephens: That wasn't made clear to us. We thought we were dealing with 561, and that Exhibit 560 had been passed over for the time being. But if you want a ruling on Exhibit 560, all right—

Mr. Steffen: (Interposing) Exhibits 560, 561 and 562 were all taken from the files of the Paragon Plaster Company, and they have each been identified as far as signature is concerned.

Justice Stephens: It is conceded, is it, Mr. Bromley, that all three documents were taken out of the files of
5047 the Paragon Plaster Company?

Mr. Bromley: We don't know anything about it. I assume, if Mr. Hansen says so, that that is right.

Justice Stephens: It was Mr. Steffen that said so.

Mr. Steffen: I stated so, and I understood from Mr. Bromley a minute ago that he made no point—

Justice Stephens: (Interposing) He made no point with respect to Exhibit 561, and I am simply trying to see to it, as it is my duty as presiding judge to do, that the record is clear on its face with respect to each exhibit offered.

There wasn't any statement concerning Exhibits 560 or 562. But you do state, yourself, that they came into your possession in connection with this covering letter which you displayed, directed to the Attorney General?

Mr. Steffen: No, your Honor. Which one do you speak of?

Justice Stephens: Exhibit 563 for identification.

Mr. Steffen: Exhibit 563 is a letter which we are simply showing to the Court for the purposes of presenting the letterhead of the Paragon Plaster Company.

Justice Stephens: I misunderstood you.

Mr. Steffen: On the matter of receiving these documents from the files of the Paragon Plaster Company, I can state for the Court's information that we have marked on the back of the papers, and I think you will find a mark on all the originals which was made there, placed there, at
5048 the time the papers were taken from the documents which were submitted to us under subpoena. It is a very careful marking, and if I may see the original of Exhibit 560, I can show it to the Court.

Mr. Bromley: I don't make any point of this. If you say you got these three exhibits, 560, 561 and 562 for identification, from the files of the Paragon Plaster Company, I will accept that.

Justice Stephens: Very well. That passes that question.

Now, the next question is what do any one of these exhibits show on their face with reference to resale price fixing by Oakfield under the direction or mandate of the Universal. We will hear you on that.

Mr. Steffen: I should like to refer first, then, to Exhibit 560, and in Exhibit 560, the next to the last paragraph on the first page gives an explicit injunction as follows:

"In quoting carload prices to your dealer trade on Gypsolite Wallboard, you will please maintain our standard price of $25 per M. sq. ft."

It also provides:

"Please use our standard weight of 1850 lbs. per M. sq. ft. in arriving at delivered prices."

We take that to be a straight injunction on the part of Universal to maintain resale prices on the sales of this board.

5049 Now, the question then comes as to what companies this is directed to. In the first place, it is obviously directed to the two Paragon companies and to the American Hardwall Plaster Company. On that I want to say that I think Judge Garrett stated our position very, very clearly, that the three parent companies here have the control of the Oakfield Gypsum Products Company, and what we have to establish is that we have an inducing or a coercion whereby the resale prices of the Oakfield Gypsum Products Corporation are maintained.

Now, coercion may be brought directly against the company which is to sell, that is the Oakfield Gypsum Products Corporation, or it may be brought against the parent companies, and in this case the letter is a flat statement that in selling from "your" Oakfield plant—and the testi-

mony indicates that the Oakfield plant is the Oakfield Gypsum Products Corporation plant—"that you must maintain our resale prices."

Now, that seems to us to be very clear evidence of coercion, addressed to, if you wish, in the first place the shareholders, that is, the Paragon companies and the American Hardwall Plaster Company; and that, certainly, would have an influence on what the related company, the Oakfield Gypsum Products Corporation, would do.

When you follow that with the evidence that we have that Mr. Hansen was also an officer of the Oakfield Gypsum Products Corporation, as well as of the Paragon
5050 Plaster Company, and moreover that he would be familiar with the purchases and transactions of Oakfield; and as a member of the executive committee would have control, together with his two associates, of the policies of the Oakfield Gypsum Products Corporation, it would seem to be very clear that upon sales made by Oakfield to dealers, they should understand that those sales should be made at the resale prices fixed by Universal.

Justice Stephens: Do you wish to be heard, Mr. Bromley?

Mr. Bromley: I have not yet objected, and I therefore desire now to object, to Exhibits 561, 562 and 563 for identification, on the ground that they are immaterial and irrelevant, because, first, as your Honor has indicated and as Mr. Steffen has agreed, there is no charge of resale price fixing—

Mr. Steffen: (Interposing) Pardon me, may I interrupt? Could we have the matter on Exhibit 560 disposed of, and then I would like to be heard on Exhibits 561, 562 and 563 also?

Justice Stephens: You are simply arguing Exhibit 560?

Mr. Steffen: My argument was addressed primarily to 560.

Justice Stephens: Well, we will deal with them one at a time.

You have already objected to Exhibit 560 as not being identified, Mr. Bromley, and we have overruled you on that.

Mr. Bromley: Yes, sir.

Justice Stephens: Now, your next objection is what?

5051 Mr. Bromley: Well, I have already made my objection to Exhibit 560, and we have argued that at length yesterday.

Justice Stephens: It seems to the Court that the objec-

tions to Exhibits 560, 561 and 562 are of the same type as far as materiality and relevancy are concerned, but if you do not want to repeat your objection to Exhibit 560, of course you need not—but you might refresh our recollection on it.

Mr. Bromley: I do want to repeat my objection and my argument as far as Exhibit 560 is concerned.

Justice Jackson: Doesn't that appear at page 5282 of the transcript?

Justice Stephens: Pages 5283 and following, I think.

Mr. Bromley: The page that Justice Jackson referred to contains my objection to Exhibit 559.

Justice Jackson: Your objection to Exhibit 560 appears on page 5286, does it not?

Mr. Bromley: Yes.

Justice Stephens: We have already ruled, Mr. Bromley, that this exhibit is not received in evidence, Exhibit 560, as tending to prove resale price fixing by the two Paragon companies or the American Hardwall Plaster Company, because they are not specified in the complaint or the bill of particulars.

Mr. Bromley: Yes, sir.

Now, in connection with the contention of Mr.
5052 Steffen that it applies to the resale prices of the Oakfield Gypsum Products Corporation, I would like to say that it is not addressed to the Oakfield Gypsum Products Corporation. The use of the word "your" throughout the letter, even in the third paragraph to which Mr. Steffen constantly refers, can only be a reference to the persons or firms to whom the letter is addressed. It states there, "The very lowest prices we can make you on your orders for your plant at Oakfield, N. Y. are as follows:".

I don't believe that that can be read to mean on Oakfield's orders for its plant at Oakfield. If that means anything, it means on the Paragon Plaster and Supply Company's orders for delivery to Oakfield.

But that is not controlling because, as your Honor said on page 5302, beginning at line 13:

"It apparently might apply to Oakfield in the third paragraph in respect to orders for Oakfield from Universal. But how it can be said by any strain of the instrument to apply to resales by Oakfield, when in the next to the last paragraph on the first page it says, 'To your dealer trade', in a letter addressed to the Paragon Plaster and Supply Company, with copies to the American Hardwall Plaster Company and the Paragon Plaster Company, we just aren't

able to see, how it has any bearing on Oakfield's resales."

I think nothing has happened so far to change the
5053 tentative conclusion which the Court reached last night that giving paragraph 3 the broadest interpretation that possibly could be given to it, nevertheless, when you come down to the only material part of the letter for the Government's purpose, all they say is, "In quoting carload prices to your dealer trade on Gypsolite Wallboard, you will please maintain our standard price", and so forth.

Now, certainly, "In quoting carload prices to your dealer trade" must refer to the company to whom the letter is addressed, Paragon Plaster and Supply Company, and probably also to the companies to whom copies of the letter were sent, the American Hardwall Plaster Company and the Paragon Plaster Company.

So I don't see that the situation has changed one iota from what it was last night, and it plainly has no materiality to the charge against the Oakfield Gypsum Products Corporation.

Justice Stephens: If there is nothing further, the Court will rule on the objections to Exhibit 560.

The Court is of the view that there is nothing on the face of Exhibit 560 that proves or tends to prove resale price fixing by Oakfield. Unless there is something further on that subject, that objection as to materiality and relevancy is sustained as to Exhibit 560.

We do not foreclose you from examining the witness further, Mr. Steffen, if the document may be proved to mean something different from what it shows on its
5054 face, subject to hearing argument on that matter from Mr. Bromley.

You have objected, Mr. Bromley, that the document is clear on its face, and that therefore it cannot be construed by the witness.

Now, as to that, it has occurred to the Court that if the Government contends that the letter had a meaning of a different character in the trade between these companies which we have been discussing here, Oakfield, the two Paragon companies, American Hardwall and Universal, if it had a meaning of a cabalistic nature, to them, or was accepted in correspondence between them in its phrasing as having a meaning different from what appears on its face, that could be shown by the witness just as you have, in several instances, Mr. Bromley, shown that although bulletins might, when read, on their face have one meaning

in the trade, they were accepted as having a somewhat different meaning.

Do you see any objection to that, Mr. Bromley? You are entitled to be heard on that before we rule on the exhibit.

I call your attention, for example, to the fact that on page 5244—in thinking over this matter last night and rereading this record—you said to Mr. Lenci, at line 13:

"Q. Quite apart from the wording, Mr. Lenci, wasn't it your understanding at all times that these provisions, that is, the earlier form of commission salesman provision, only applied to the use of commission men for the pur-
5055 pose of cutting the price of patented board?"

Then at page 5245, at line 21, you said:

"Q. And isn't that likewise true of the provisions with respect to warehouses and customers' trucks, that is to say, that your understanding of the purpose of those provisions—whatever the wording was—was that those arrangements were prohibited only where they were used to effect a cut in the price of the patented board?"

There you were dealing with bulletin provisions which, on their face, seemed to prohibit the use of warehouses and customers' trucks at all and prohibit the use of commission men at all, and you were asking Mr. Lenci if it wasn't the fact that notwithstanding that clear wording, they were applied in the trade in a different manner. Now, of course, there is the general rule of construction that a document clear on its face cannot be varied, I mean varied by parol testimony; but I think there is an exception to that rule where the document is used between certain parties and it may be shown, as between the parties to the document, or the parties using the document, that it does have a meaning different from that clearly expressed on its face, as applied between them.

And if the Government contends that this Exhibit 560 does in some manner indicate, as between Universal, the two Paragon companies, American Hardwall, and
5056 Oakfield, a direction to fix the resale price by Oakfield, I suppose the witness could be interrogated on that subject, but I don't rule that without further hearing from you, Mr. Bromley, because it is a new point.

Mr. Bromley: That may possibly be so, but there are two points with respect to that.

This witness says that he doesn't remember having seen this document, and I do not see how he can now interpret it in the light of that.

Secondly, I thought this morning that counsel made that very attempt to develop from this witness that this letter would apply to Oakfield, and the answer was that Oakfield had its own stationery, and its own office, and its own officers, and its separate existence, and I thought it was pretty conclusively established that this letter couldn't refer to Oakfield because of the fact that Mr. Steffen brought out that if it had been intended to go to Oakfield, it would have been addressed to that Company.

Justice Stephens: That is a little bit different from what the Court had in mind. I thought possibly the Government, in view of their suggestion with respect to interrogating the witness, was going to attempt to interpret these two paragraphs of Exhibit 560 which have been under discussion here.

Do you wish to be heard, Mr. Steffen?

5057 Mr. Steffen: Yes, I should like to interrogate the witness further, and I assume proper objection will be made as I ask the questions.

I think I might state, your Honor, that there apparently is ambiguity in Exhibit 560 as to what is meant by "your plant at Oakfield", and if the parties understand what is meant by "your plant at Oakfield", that ought to clarify the whole matter.

Justice Stephens: Well, even if you go that far and the witness testifies that "your plant at Oakfield" meant the Oakfield plant, it still doesn't seem to the Court that it says anything about resale price fixing by Oakfield; it says what Oakfield shall pay for these goods, not what it shall sell them at.

However, you may ask the witness further questions, and Mr. Bromley may object and we will rule on them as objection is raised.

Mr. Bromley: I don't see why counsel doesn't ask him if he had any agreement to fix the resale prices, and get on with the case.

Justice Stephens: I have already suggested that to counsel. I would seem to me that if the Government in good faith contends that there was resale price fixing between Universal and Oakfield, that this witness certainly ought to know about it and should be interrogated directly
5058 about it. However, you are not foreclosed from proving your case in any way you feel you must. That is your responsibility, not ours.

Justice Jackson: That is the way I felt this morning,

and that is the reason I didn't give any statement concerning this exhibit. I thought you were going to question him directly.

Mr. Steffen: We want to proceed in entire good faith, your Honor.

By Mr. Steffen:

Q. Mr. Hansen, you testified that purchases were made through your office at Syracuse on Oakfield Gypsum Products Corporation's forms from Universal, is that correct? A. Yes.

Mr. Bromley: I object to that, that assumes a fact not in evidence.

Mr. Steffen: He has just testified that it was in evidence.

Mr. Bromley: No, he didn't. He said he made purchases through the Oakfield office.

Justice Stephens: Let's hear that question.

(The question was read by the reporter.)

Justice Stephens: What is your objection to that, Mr. Bromley?

Mr. Bromley: I don't know what "your" means. It is indefinite, and for that reason improper, because in the light of the dispute here "your" may mean either
5059 Oakfield or Paragon.

Justice Stephens: I think that objection is well taken.

Ask him how the transactions were handled. Let him tell in his own way. He ought to know.

By Mr. Steffen:

Q. I want to get at the question of purchases made on Oakfield's forms from Universal. There were such purchases, were there not? A. That is right.

Q. My next question is at what prices were those purchases made? A. Will you repeat that?

Q. At what prices did you buy from the Universal Gypsum Company?

Justice Jackson: Did Oakfield buy?

Mr. Steffen: Did Oakfield, yes.

The Witness: At what prices did Oakfield buy from the Universal Gypsum Company?

Mr. Steffen: On these purchases you have just said were made.

The Witness: Well, at the current quoted prices.

By Mr. Steffen:

Q. And were they the same prices at which your company was buying board from Oakfield?

Mr. Bromley: I object,—

5060 Justice Stephens: (Interposing) When you mean Paragon, say Paragon, and when you mean Oakfield, say Oakfield. I think that will clarify the matter.

By Mr. Steffen:

Q. If I understand it, Mr. Hansen, you personally directed purchases to be made in the name of the Oakfield Gypsum Products Corporation from Universal of board? A. That is right.

Q. And your company, the Paragon Company, also bought board from Universal during 1928 and 1929? A. That is right.

Q. Now, my question is—at what prices did, first, the Oakfield Gypsum Products Corporation buy? A. I could hardly be expected to remember the prices in 1928, sir.

Q. That is right.

Were there prices furnished by Universal at which the Oakfield Gypsum Products Corporation purchased? A. Yes, sir.

Q. Can you tell us how they were furnished? A. Well, they were furnished in correspondence to me personally, to Mr. Merriman, and to Mr. Eldred, as indicated in this copy of the letter. That was typical of the quotation sheets that we would get.

Q. Exhibit 560 would be a typical quotation sheet?

5061 A. That is right.

Q. And in making sales by Oakfield, at what prices would the Oakfield Gypsum Products Corporation resell to dealers? A. Would resell to dealers—unless you called the American Hardwall Plaster Company, the Paragon Plaster of Syracuse, and the Paragon Plaster and Supply Company, dealers—they were the only three customers for the gypsum products other than gypsum rock, that Oakfield had.

Q. At this particular time? A. At this particular time.

Mr. Bromley: I didn't get the beginning of that answer.

Justice Stephens: Read it.

(The record was read by the reporter.)

Mr. Bromley: That isn't what he said.

Justice Stephens: No; Mr. Reporter, that was not the answer. It will have to be stricken, and you will have to re-ask the question.

By Mr. Steffen:

Q. I think you testified that the Oakfield Gypsum Products Corporation would sell to Paragon and would make shipments direct to Paragon's customers where Paragon had sold to a customer, is that correct?

Mr. Bromley: I object to that. Can't we have this last question asked, so that we can get the answer in the record?

Mr. Steffen: I was starting back and was coming up to that.

5062 Justice Stephens: I think we ought to have this last question answered so that the record is clear as to what his answer was.

Mr. Bromley: I think I did the reporter an injustice, and that he was right, and that the first part of the answer, which the reporter read, was merely the witness repeating the question.

Justice Stephens: Maybe I also did the reporter an injustice. Read back the original question, Mr. Reporter.

(The question was read by the reporter as follows:)

"And in making th sales by Oakfield, at what prices would the Oakfield Gypsum Products Corporation resell to dealers?"

Mr. Steffen: I would like to withdraw the question.

Justice Stephens: And I would like to know what the answer was.

(The answer referred to was read by the reporter as follows:)

"Would resell to dealers—unless you called the American Hardwall Plaster Company, the Paragon Plaster of Syracuse, and the Paragon Plaster and Supply Company, dealers—they were the only three customers for the gypsum products other than gypsum rock, that Oakfield had."

Justice Jackson: It was merely a matter of inflection in the reporter reading the answer.

5063 Justice Stephens: Now, if you want to withdraw it or ask another question, you may do so.

Mr. Steffen: I think that is a good answer.

By Mr. Steffen:

Q. I think you testified that the Paragon Plaster Company sold both as a dealer and as a jobber, did you not—Paragon sold locally in Syracuse? A. That is correct.

Q. And you also sold as a jobber? A. That is correct.

Q. Now, let me ask you this question. If sales were made by the Oakfield Gypsum Products Corporation of this board which they purchased from Universal, at what price would you understand from this letter, Exhibit 560, the Oakfield Gypsum Products Company should sell?

Justice Stephens: Read that question so that we can get it entirely clear.

(The question referred to was read by the reporter.)

Justice Jackson: Do you get that question?

The Witness: No, unless it is a hypothetical question.

Mr. Bromley: I object to that as incompetent, because it calls for an interpretation of a document, and the document is not in evidence, and the question assumes facts not in evidence.

Mr. Steffen: I will rephrase the question and leave
5064 out the reference to the exhibit.

By Mr. Steffen:

Q. At what prices, Mr. Hansen, would you understand the Oakfield Gypsum Products Company should sell to dealers according to your arrangement with the Universal Gypsum Company, in 1928 and 1929?

Mr. Bromley: I object to that as incompetent because calling for a conclusion and assuming facts not in evidence. There is no proof that there was any arrangement with Universal.

Justice Stephens: Objection sustained. Ask the witness what the arrangements were, if any, and what the prices were, if any.

Mr. Steffen: All right.

By Mr. Steffen:

Q. What were your arrangements, if any, with the Universal Gypsum Company for the resale of board by the Oakfield Gypsum Products Corporation to dealers? A. We had none because the Oakfield Company did not sell to dealers.

Q. You have just testified that you were a dealer? A. Well, I can answer—

Q. (Interposing) And so was American Hardwall a dealer and so was the Paragon Plaster and Supply Company. A. All right. The answer is still that there was no arrangement for resale. You are referring to the
5065 prices at which Oakfield sold to these three companies who were its dealers and jobbers, we will say.

Q. Were there any sales made later than 1928 of Universal's board bought by Oakfield Gypsum Products Company? A. Later than 1928?

Q. Yes, to dealers. A. I think not.

Justice Stephens: When you say "dealers" there, do you mean dealers other than the three corporate owners of Oakfield?

Mr. Steffen: Yes, I mean other than the two Paragon companies and the American Hardwall Plaster Company.

Justice Stephens: I don't think the witness understood that.

The Witness: I answered it meaning dealers other than the three.

Justice Stephens: Your testimony is then, that as far as you recollect there were no sales to dealers other than these three corporate owners of Oakfield, after 1928?

The Witness: Of Universal's board. That is to the best of my recollection. We changed brands in about 1931, I should say.

Mr. Steffen: I would like now to ask some questions, your Honor, directed to show that the Oakfield Gypsum Products Corporation and the three constituent companies were substantially together as one organization.
5066 Justice Stephens: You mean on the theory that the corporate fiction must be disregarded?

Mr. Steffen: That is right, and that therefore resales by the Paragon companies and American Hardwall, of board purchased nominally from the Oakfield Gypsum Products Corporation, was actually a controlling of the resale price of, if you wish, the Oakfield Gypsum Products Corporation, they buying from Universal, and then the transaction between Oakfield and the three parent companies being a strictly friendly transaction, the resale, which constituted a resale, was the sale by the parent companies to the dealers.

We have already developed in evidence that the three companies owned all the stock of Oakfield, that they regarded, in a sense, the Oakfield Gypsum Products Corporation as being a source of supply for the three mixing

companies; that the officers were identical, or at least the managing officers and principal officers of the three constituent companies were the same officers as were managing the Oakfield Gypsum Products Corporation; that the sales officers, or principal offices, of the Oakfield Gypsum Products Corporation, were in the offices of the Paragon Plaster Company and the other parent companies; and that therefore you have the form of a sale to the Oakfield Gypsum Products Corporation, which is designated in here as "your plant"; that the Oakfield Gypsum Products Corporation then, by selling to Paragon, has, in effect, sold through Paragon to the dealers, or at least Paragon and Oakfield for the purposes of that transaction can be regarded as one company.

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But in so far as Universal is concerned, it would constitute a control of the resale price of Oakfield.

I think I can ask one or two further clarifying questions which would bring that out.

Justice Stephens: I don't quite understand your theory. It seems to me—I may be wrong—that your proposal is an invasion of the ruling of the Court that there is no charge in the complaint of any resale price fixing as between Universal and the two Paragons and American Hardwall.

This witness has answered that there were no arrangements between Oakfield and Universal as to its resale prices to these three companies, the two Paragons and the American Hardwall.

Now, as I understand it, you want to disregard the corporate fiction for the purpose of showing that the four companies were all one and that therefore the sales that were made by the two Paragon companies and the American Hardwall, were at resale prices fixed by Universal.

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Mr. Steffen: That is right.

Justice Stephens: But the bill of particulars doesn't charge resale price fixing by those three companies, either through a corporate fiction or otherwise.

Mr. Steffen: I agree with that, but that would depend on which price was being controlled, that is, in which capacity are you going to regard this corporate layout after you have identified them? Are you going to treat them as Oakfield, selling through the medium of its parents, or are you going to regard it as the parents which are making the resale? My thought is this, that the relationship between Paragon and Oakfield was very close. When

they bought board, supposedly from Oakfield, Mr. Hansen dealt with Mr. Hansen, or Mr. Hansen and his associates, and the price at which Paragon bought from Oakfield was strictly a friendly price; that while they went through the form of a sale, there wasn't any actual sale there. Therefore, if Universal sold to Oakfield, and they then had a bookkeeping sale between Oakfield and Paragon, all parties knowing that the ultimate transaction was to go to a dealer, you have, in effect, a control of the resale price of Oakfield on board certainly bought from Universal by Oakfield. And this letter would make it very clear that the dealer price, that is, the ultimate dealer price—disregarding for the moment Paragon as being a dealer—that the ultimate dealer price would be regulated, in Exhibit 560.

5069 Justice Stephens: In other words, your theory is that you can prove that there was some secret arrangement or private understanding or tacit understanding, between these three companies and Oakfield, that Oakfield was really the seller to the ultimate dealer, and that the sales which the 2 Paragon companies and American Hardwall purported to make to the ultimate dealer were really Oakfield's sales, and that Oakfield was therefore selling at the price fixed by Universal. Is that it?

Mr. Steffen: That is substantially the argument.

Justice Stephens: Are you prepared to prove that there was some secret and tacit understanding of such character as would permit the Court to disregard the corporate fiction?

Mr. Steffen: I think I can establish, by Mr. Hansen, what the sales arrangements were between Oakfield and Paragon Plaster Company; and that they, as I have said, were a strictly friendly arrangement.

Justice Stephens: Do you wish to be heard, Mr. Bromley, as to this proposed line of examination?

Mr. Bromley: It seems to me that it is entirely immaterial and highly improper. He proved that there was a sale yesterday, there was a sale between Oakfield and Paragon, yesterday.

Now I don't think it is within the issues of this case—certainly we have had no notice of it—that he was

5070 going to embark on the long and difficult undertaking of trying to pierce the corporate veil. Furthermore, he has specifically here, several times, waived any claim that

this evidence was in support of a charge that Paragon's prices were fixed.

Now he wants to go back and establish that charge, and then go a step farther and say, "Well, after all, it is Oakfield." So I think on any principle of issues as framed by the pleadings, it is clearly beyond any issues, and certainly ought not to be permitted now.

Furthermore, I don't think his offer of proof amounts to an offer to pierce the corporate veil. He says he wants to show that the sales were friendly. Well, if that is it, it is immaterial.

Justice Stephens: We are of the view, Mr. Steffen, that the inquiry is not proper, and not within the pleadings, and contrary to the very proof that you have already made in the case. You proved yesterday that there was a bona fide sale between Oakfield and the two Paragons and the American Hardwall. Now, apparently, you are undertaking to prove the contrary of that, that this was a trumped-up arrangement, and that all the companies were really one, and that they all connived at the price fixing arrangement charge. It is not within the pleadings. It involves the charge that the two Paragons and American Hardwall were involved in a price fixing undertaking, and that is not
5071 within the pleadings; and there is no charge of fraud in respect of the corporate fiction.

We are all agreed that it is not a proper inquiry. If you want to protect your record, you can ask the questions and have the objections passed upon individually.

Mr. Steffen: I had possibly better make a straight offer of proof.

We offer to prove, by questions directed to Mr. Hansen, that the Paragon Plaster Company, and the Paragon Plaster & Supply Company, and the American Hardwall Plaster Company, completely controlled the sales policies and the affairs of the Oakfield Gypsum Products Company; and that the purchases from Oakfield Gypsum Products Corporation, by any one of the parent companies, of gypsum board which the Oakfield Gypsum Products Corporation should buy from Universal Gypsum & Lime Company, were in the nature of bookkeeping transactions only; and that they were made with the understanding, and effect, that the board would be resold to dealers; and that in those resales to dealers, the prices which the Universal Gypsum Company specified in its letter of July 9, 1928, Exhibit 560, should be maintained; and that, therefore, the evidence

would show that the Universal Gypsum & Lime Company, one of the alleged conspirators in this case, had used improper means to induce and coerce manufacturing distributors to resell at fixed resale prices.

5072 Justice Stephens: It seems to us, Mr. Steffen, that what that amounts to, if you pierce the corporate veil and show that these four companies were all one, is, in effect, that you are charging or trying to prove that there was price fixing by the two Paragons and American Hardwall, through the device of selling through Oakfield, and that is not covered by the charge in the complaint.

Therefore, the objection is sustained, and the offer is rejected.

(Thereupon, at 12:15 o'clock p.m., a recess was taken until 1:45 o'clock p.m., of the same day.)

5073 AFTERNOON SESSION

(The trial was resumed at 1:45 o'clock p.m., pursuant to recess.)

Justice Stephens: Proceed, gentlemen.

Thereupon, EMIL HANSEN the witness on the stand at the time of recess, resumed his testimony as follows:

Direct Examination (resumed):

Mr. Steffen: For the purpose of clearing the record, Your Honor, I would like to ask one or two questions concerning Mr. Hansen's answer to my question regarding the sales by Oakfield to Paragon.

By Mr. Steffen:

Q. I believe you testified, Mr. Hansen, that you had no arrangements with Universal concerning Oakfield's sales to Paragon—or was that your testimony? A. The answer is "No" to that.

Q. That is what you testified before? A. I think so.

Q. And did you have anything to do with the original negotiations with Universal? A. Yes.

Q. And who did you see, or who did you talk with?

A. Mr. Stromquist.

5074 Q. When you originally started buying—and by "you" I mean either Paragon or Oakfield started buying from Universal, is that correct? A. That is right.

Q. When you said you had no special arrangement as to prices between Oakfield and Paragon, you mean that that was not discussed with Universal? A. That is correct.

Q. Did you ever buy board from Universal—and by "you" I mean Paragon—and have it shipped to Oakfield?

Mr. Bromley: I object to that as immaterial. Isn't this the same subject matter again?

Mr. Steffen: I want to probe this matter of special arrangements, Your Honor, for about four or five questions.

Mr. Bromley: It seems to me it trespasses upon the ruling, because it has to do with Paragon.

Justice Stephens: We can't tell, Mr. Bromley. It may go to a different matter. We will receive it subject to a motion to strike unless it proves to be material.

By Mr. Steffen:

Q. Was there any practice on that part of Paragon to buy board from Universal and to have it shipped to Oakfield?

Mr. Bromley: The same objection.

Justice Stephens: The same ruling. You may answer, subject to a motion to strike.

5075 The Witness: The answer is no.

Let me get that straight—did Paragon order board and ship it to Oakfield, New York?

By Mr. Steffen:

Q. Order board from Universal and have it shipped to Oakfield, New York. A. The answer is no.

Q. And you would say that all shipments that went to the Oakfield plant were bought in the name of Oakfield? A. That is right.

Q. And that Oakfield, during this period, 1927 and 1928, if I understand your testimony, sold to Paragon, either of the two Paragons, or American Hardwall Plaster Company? A. That is correct.

Q. And your testimony was that you had no special arrangements with Universal as to the price at which Oakfield would sell to Paragon? A. That is correct.

Mr. Bromley: I don't understand what "special" means. He had no arrangement.

Justice Stephens: He testified that he had no arrangement, he didn't say "special" arrangement.

Mr. Steffen: All right, strike the word "special".

By Mr. Steffen:

5076 Q. Could you answer this question, Mr. Hansen: Did the letter of July 9, 1928,—which is Exhibit 560 for Identification, which we showed you this morning,—as you understood it, apply to the Oakfield Gypsum Products Corporation's purchases from Universal?

Mr. Bromley: I object to that as incompetent because calling for the construction of a written document which is not in evidence.

Justice Stephens: Well, there, I think, the objection is not well taken. I think my colleagues agree with me. I was about to announce, before Mr. Steffen proceeded in this examination, that I wanted to make it clear that the Court did not foreclose the Government—I thought I had made it clear, but I want to make it doubly clear—the Court does not assume to foreclose the Government from attempting to prove that this letter, which we rule on its face does not have any application to Oakfield, nevertheless was understood in the trade, between these four companies, as applying to Oakfield in respect of resale prices. I think that is proper examination, if this witness can so testify.

The objection is overruled, to that.

Do you understand that, Mr. Hansen?

The Witness: As to what I may answer?

Justice Stephens: Yes.

The Witness: I think so.

5077 Mr. Steffen: Do you understand the question?

The Witness: May I have it again?

Justice Stephens: Read the question again.

(The pending question was read by the reporter as follows:

"Could you answer this question, Mr. Hansen: Did the letter of July 9, 1928,—which is Exhibit 560 for Identification, which we showed you this morning,—as you understood it, apply to the Oakfield Gypsum Products Corporation's purchases from Universal?")

Justice Stephens: I thought that was not the question. I thought you were trying to find whether it applied to the resale prices by Oakfield.

Mr. Steffen: I wanted it to apply to both.

Justice Jackson: Why not ask him directly what was his understanding?

By Mr. Steffen:

Q. What was your understanding of Exhibit 560, which

I now show you, as it applies to purchases by Oakfield from Universal?

Mr. Bromley: I object to that question. There are two subject matters in the letter, and the ruling is that you may inquire as to resale prices of Oakfield.

Justice Stephens: That is right.

The price at which the sales were made to Oakfield
5078 is not in issue, is it?

Mr. Steffen: No.

Let me ask this question:

By Mr. Steffen:

Q. What was your understanding, Mr. Hansen, with respect to Government's Exhibit 560, as to the letter's application to resales by Oakfield Gypsum Products Corporation?

Mr. Bromley: I object to that as incompetent because the witness has testified he has no recollection of receiving the letter.

Justice Stephens: Well, the witness has said, Mr. Bromley, that the letter was typical of various bulletins or sales announcements received by him from Universal, so I think that is all right. That objection is overruled. The witness may answer what, if any, application this letter had to resale prices by Oakfield.

The Witness: None whatsoever.

By Mr. Steffen:

Q. I think you have answered it completely, Mr. Hansen. A. Pardon me?

Q. I think that is a complete answer.

Mr. Bromley: Well, there is no question.

The Witness: The only reference to Oakfield is in
5079 this paragraph 3, quoting a price for delivery at Oakfield.

By Mr. Steffen:

Q. That is right. And you don't construe the last paragraph as having anything to do with the resale price by Oakfield? A. No, because Oakfield wasn't reselling to dealers, other than the three constituent companies.

Q. And you didn't think there was any regulation— A. (Interposing) And if that were an application to the Oakfield Company as to a pricing policy, then we did not follow it in selling to the three constituent companies.

Q. And you didn't regard the letter as requiring you to follow it, is that it? A. That is right.

Q. And was that, Mr. Hansen, because of the close relationship between Paragon and Oakfield, that you considered this letter didn't apply to sales between Oakfield and Paragon?

Mr. Bromley: I object to that as incompetent because being pure speculation.

Mr. Steffen: I am asking for his reason as to why it shouldn't apply to this type of sale.

Justice Stephens: We think the question is objectionable in asking for the reasons as phrased in the question, because it is an invasion of the ruling this morning
5080 that we are not going to hear testimony, under the pleadings as drawn, concerning alleged resale price fixing by Paragon, by the two Paragons and American Hardwall. If you want to ask this witness, if you think it is necessary to supplement your question, as to why this letter does not apply to the resale prices by Oakfield, if he can tell you anything more on that subject, you may ask that.

By Mr. Steffen:

Q. Will you answer the Court's question, Mr. Hansen? A. I didn't get that?

Q. Could you answer the Presiding Justice's question, which I would be very glad to ask you? A. Why this did not apply to Oakfield's sales to the three constituent companies?

Justice Stephens: Or to anyone.

The Witness: Well, my answer—

Justice Stephens: (Interposing) The Court is not insisting that you argue the matter, of course, Mr. Hansen. You have answered, as I have understood your testimony, that Oakfield didn't sell board to anybody but the three constituent companies.

The Witness: Yes, sir.

Justice Stephens: It sold rock to third parties, but not board?

The Witness: That is right.

5081 Justice Stephens: Now, you have testified that this letter, as you understood it, did not constitute a direction by Universal to Oakfield in respect to resale prices. Counsel apparently wants to inquire how you reached the conclusion that it did not.

If you can add anything to what you said in your previous

statement concerning the paragraphs to which you referred, you may do so, but you are not required to.

The Witness: Well, if this was meant as a direction, we ignored it.

Mr. Steffen: That is satisfactory.

Justice Garrett: And by "we", you mean Paragon?

The Witness: Paragon, the American Hardwall Plaster Company, and Paragon of Scranton.

Mr. Bromley: Well, I thought the question had to do with Oakfield.

Justice Stephens: He meant—well, I don't want to say what he meant.

Mr. Bromley: You ignored it as to Oakfield, too, didn't you? You say it didn't apply to Oakfield, is that what you mean?

Mr. Steffen: The question is: What did you mean when you said "we ignored it"? Did you mean Oakfield and the two Paragons and the American Hardwall, all four companies?

The Witness: I should say that the Executive
5082 Committee of the Oakfield Gypsum Products Corporation ignored it, if they ever took any formal action or gave it any formal consideration.

Justice Stephens: We hope, gentlemen of the Government, that you can move on to some more profitable subject. We spent half of yesterday afternoon and all this morning on matters which really could have been developed, it seems to us, by direct-examination of this witness in about 15 minutes.

Justice Garrett: Was Exhibit 559 introduced?

Mr. Steffen: No, Your Honor.

Justice Stephens: Exhibit 559 was not introduced.

Mr. Steffen: Neither was Exhibit 560.

Justice Stephens: Exhibit 560 we ruled to have been identified; but the questions to and answers of the witness having indicated that it has no relevance as applied to Oakfield, the record will show—so that the Government's record may be protected—that the exhibit is excluded from evidence.

Mr. Steffen: Has Exhibit 561 been acted upon?

Justice Stephens: No, it has not. We haven't that before us. That is in the form of a letter. Will you hand that to the Court, please?

(Exhibit 561 for Identification was handed to the Court.)

Justice Stephens: Government's Exhibit 561 is
5083 excluded from evidence, is not received in evidence, for the same reasons as relate to Exhibit 560.

Q. Now, Mr. Hansen, did you change your source of supply of gypsum board along in 1928, 1929 or 1930,—and by "you" I mean the Paragon Plaster Company or Oakfield? A. Yes, sir.

Q. And can you tell us what other companies you discussed the matter of buying board from, with? A. We discussed the matter with the Kelley Plasterboard Company; with Ebsary Gypsum; and possibly with National Gypsum, I don't recall.

Q. I want to show you again Government's Exhibit 562, which you have identified, I believe.

(Government's Exhibit No. 562 for Identification was handed to the witness.)

By Mr. Steffen:

Q. Was it at about the time of that letter that you took up the matter with, or were approached by, the Ebsary Gypsum Company? A. Yes.

Q. And by "that letter," I refer to Government's Exhibit 562. A. Yes.

Q. Did you, at the time of that letter, effect an
5084 arrangement with the Ebsary Gypsum Company to buy board from them? A. No, sir, but we were free to buy from them.

Q. I understand. And they made you an offer, did they? A. That is right.

Q. And on what basis did they offer to sell you board? A. May I indicate now that you are talking about the Paragon Company?

Q. I wish you would, yes. A. That is correct.

Q. And did they offer to sell you at a discount, and by "you" I mean the Paragon Plaster Company?

Mr. Bromley: I object to that as immaterial.

Justice Stephens: On the ground that there is no charge of conspiracy or resale price fixing by Paragon?

Mr. Bromley: Yes, sir. There is no charge with respect to Paragon at all.

Mr. Steffen: I wish to follow it up, Your Honor, by first showing that if they were buying at a discount, they would be buying on a jobber basis; and I think the evidence will further disclose that they no longer buy on a basis that they were then offered.

Justice Stephens: What is the materiality or relevancy of it, in view of the fact that Paragon is not made a
5085 party to the suit in any particular?

Mr. Steffen: One of the charges in the complaint is that jobbers have been eliminated, and here is a situation where Paragon was being offered on the basis of a discount from the dealer price, as a jobber. I want to show that the offer existed at that time.

Justice Stephens: I didn't realize you were changing to that different issue.

Mr. Steffen: I now offer Government's Exhibit 562 in evidence.

Justice Stephens: Mr. Bromley's objection on the ground of immateriality is overruled, since the evidence is proposed to relate to the charge of elimination of jobbers. Whether the exhibit tends to prove that, we don't yet know. We would have to look at it.

(Exhibit 562 handed to the Court.)

Justice Stephens: Is there any objection to this document as to identification? You testified that this was Mr. Lenci's signature, didn't you, Mr. Hansen?

The Witness: That is right.

Justice Stephens: And that you received it?

The Witness: That is correct.

Justice Stephens: We think that this is admissible in evidence under the elimination-of-jobber issue, because of its reference to a discount of 10 percent on $22.50 and
5086 $15.00, respectively. It may be that it has some relevance to that subject. Received in evidence.

(The document referred to, marked as Government's Exhibit No. 562, was received in evidence.)

Justice Stephens: Mr. Adams, how long will you be with us now?

Mr. Adams: So long as I can be of any help, Your Honor.

Justice Stephens: Well, we want to make a ruling sometime within the next day or so on the matter of Exhibits Nos. 324 and 233, and we want to make it in your presence.

Mr. Adams: I don't want to interrupt you now, but I want to say I am extremely sorry that I couldn't be here earlier in the week. The manpower shortage has caught up with our office.

Justice Stephens: It hasn't inconvenienced us at all. We just missed you, Mr. Adams.

Mr. Adams: Thank you, Your Honor.

Justice Stephens: Mr. Knuff, will you get for us photo-

stats of such exhibits as have been referred to here and of which we do not have copies, as soon as you reasonably can, as we like to read them at night when we read the testimony.

Mr. Knuff: I don't think I can get them today, but I will get them as soon as our photostatic room can
5087 get them out.

Mr. Bromley: Exhibit 562 should be received, should it not, subject to the usual reservation?

Justice Stephens: Yes, it is received subject to the usual reservation with respect to declarations of alleged co-conspirators.

Mr. Steffen: In order to clear the record, I would also now like to call up Exhibit 563, which was offered simply to show that the Paragon Plaster Company was holding out to the world the fact that they had two offices, that they had an office at Syracuse and a mill at Oakfield.

Justice Stephens: Well, that was shown by the testimony of the witness.

Have you any objection as to that?

Mr. Bromley: Only that it is immaterial, in view of the witness' testimony.

Justice Stephens: Well, it seems to us that it is immaterial; but if you want to make a record you may offer the exhibit, and it is not received,—so that the ruling will be there to protect you. The witness' testimony stands.

By Mr. Steffen:

Q. Did you, subsequently, enter negotiations, Mr. Hansen, with the Kelley Plasterboard Company? A. Yes, sir.

Q. And did you personally handle any of the
5088 negotiations? A. A part of them.

Q. And did you effect an arrangement at any time with the Kelley Plasterboard Company for the purchase of board? A. Well, I had a part in the planning.

Q. But such an arrangement was subsequently effected? A. That is right, yes, sir.

Q. And that applied to what companies?

Mr. Bromley: Was that in writing, may I ask?

Mr. Steffen: I can ask him this question whether it was in writing or not, can I not?

Mr. Bromley: If it was a written contract, which I believe it to be, it seems to me that the contract is the best evidence.

Justice Stephens: Read the question.

(The pending question was read by the reporter.)

Justice Stephens: If it is preliminary, the answer may be given; but if it appears that there was a written arrangement, then the writing should be introduced.

Mr. Steffen: I will withdraw the question, Your Honor.

By Mr. Steffen:

Q. I now show you what has been marked as Government's Exhibit No. 564, which purports to be a letter from the Kelley Plasterboard Company, addressed to the Paragon Plaster Company, under date of December 4, 1930.

5089 (The document referred to was marked as Government's Exhibit No. 564 for Identification.)

(Government's Exhibit No. 564 for Identification was handed to the witness.)

By Mr. Steffen:

Q. Have you examined Government's Exhibit 564 for Identification, Mr. Hansen? A. Yes, sir.

Q. Do you identify that as Mr. Kelley's signature? A. That is right.

Q. That is a letter that you received, is it? A. Yes, sir.

Mr. Steffen: We offer Government's Exhibit 564 in evidence.

Mr. Bromley: Objected to on the same ground as heretofore stated with respect to Exhibit 560.

Justice Stephens: What do you intend to prove by this?

Mr. Steffen: I intend to show, first, Your Honor, the arrangement at this time between the Kelley Plasterboard Company and the Paragon Plaster Company and the Oakfield Gypsum Products Corporation; and I intend to ask the witness just what the transaction is. I don't think the letter is entirely clear, but it indicates in the third paragraph on the first page that, "We are to continue to

5090 bill the Oakfield Gypsum Company on any orders placed by Mr. Miles for your account."

In the second paragraph, it indicates that Mr. Miles will sell at prices supplied by the Kelley Plasterboard Company.

I don't think that the letter, on its face, is ambiguous. I, however, will ask the witness as to the transaction.

Justice Stephens: Let me get the theory of the pleadings under which it is being offered. Is it offered as a part of your case under the charge of resale price fixing in respect of manufacturing distributors? In other words,

you are trying to prove here that Kelley was fixing the resale prices of Oakfield?

Mr. Steffen: That is right, Your Honor, because from this time on, there are no sales to Paragon. The sales are made to Oakfield.

Justice Stephens: Then the objection is overruled. We make no comment upon the weight of the letter. The letter doesn't seem to be entirely clear on that subject, but it does seem to have some relation to that topic. So you may pursue that. The objection is overruled.

(The document referred to, marked as Government's Exhibit 564, was received in evidence.)

By Mr. Steffen:

5091 Q. Mr. Hansen, at this time, was the Oakfield Gypsum Products Corporation buying board from Kelley? A. Yes, sir.

Q. And who is Mr. Miles? A. Mr. Miles was a salesman for the Paragon Plaster Company in the metropolitan district.

Q. And on what basis was he paid? A. On a commission basis.

Q. And—

Mr. Bromley: (Interposing) Then I move to strike out the exhibit, if Mr. Miles was a Paragon salesman. The letter is addressed to Paragon, and the only sales that are talked about are by Mr. Miles.

Mr. Steffen: I want to carry through this transaction, and I think it will be cleared up.

Justice Stephens: We can't rule on it piecemeal, Mr. Bromley. We will have to hear more before we can tell whether this is relevant or irrelevant. It will be received, but you may reserve a right to move to strike it if, on the completion of this aspect of the testimony, it appears to be not material or relevant under the pleadings.

By Mr. Steffen:

Q. Will you tell the Court just how sales were made pursuant to this letter, Government's Exhibit 564? A.

Mr. Miles was selling neat plaster for us in the 5092 metropolitan market—

Justice Stephens: (Interposing) Mr. Hansen, will you let me make a suggestion to you?

The Witness: Yes.

Justice Stephens: Please, whenever you mean Paragon, say Paragon; and whenever you mean Oakfield, say Oakfield. When you say "us", we still have a little ambiguity.

The Witness: Yes, sir.

Mr. Miles was making sales for Paragon, in the metropolitan district, of neat plaster. He saw an opportunity of selling some of the dealers, to whom he was selling plaster, gypsum board and gypsum lath in truckload lots. It was not economical to ship it by car from Oakfield to the metropolitan district in competition with the metropolitan manufacturers. Paragon, therefore, made this arrangement with Kelley,—that Paragon should have permission to sell to certain dealers in the metropolitan district, listing those dealers with Mr. Kelley so that we would not conflict with his major accounts to which he was selling direct. The material, as stated here, was all invoiced to the Oakfield Gypsum Products Corporation—

Mr. Steffen: (Interposing) Now—

Mr. Bromley: (Interposing) Let him finish, please.

Justice Stephens: Go ahead and finish your answer.

The Witness: (Continuing)—to the Oakfield Gypsum Products Corporation, and re-invoiced by Oakfield to Paragon.

5093

By Mr. Steffen:

Q. Mr. Miles, as I understand it, if he made a sale, would notify the Kelley Plasterboard Company of that sale, would he?

Mr. Bromley: I object to this as leading.

Mr. Steffen: Yes, I think it is leading.

Justice Stephens: That objection is sustained. The witness is competent to tell about the transaction in his own words. If it needs any more explanation you may ask him to explain particular details of it, but let him do it in his own way.

By Mr. Steffen:

Q. Explain just how Mr. Miles would handle the transaction with the Kelley Plasterboard Company? A. Well, practically as stated in the letter. To a select list, which we approved—

Justice Stephens: (Interposing) By "we", you mean?

The Witness: Paragon approved.

(Continuing)—and filed with Kelley, Miles was permitted to send the orders directly to Kelley for Paragon, and thereafter, for billing to Oakfield, for deliveries to these dealers in the metropolitan district. And Paragon enjoyed some business on that basis.

Justice Stephens: Let me see if I understand you.
5094 Do you mean by that that Paragon, acting through Miles, ordered board from Kelley for the account of Oakfield; then Paragon, selling it to this select list, would have it invoiced to it from Oakfield in the manner you described yesterday?

The Witness: That is right.

By Mr. Steffen:

Q. Well, as I understood your testimony, it would be invoiced by Kelley to Oakfield, is that right? A. That is right.

Q. And then Oakfield, in turn, would re-invoice it to the Paragon Plaster Company? A. That is right. May I go on to explain?

Q. Yes, I would like to have it fully explained.

Justice Stephens: You may feel entirely free to make as full an answer as you need, in order to make the answer clear.

The Witness: This was done in order to expedite deliveries and to save time, so that instead of having Miles send an order to Syracuse, we had this arrangement to save two days, and therefore get an immediate delivery in the New York district.

Justice Stephens: By "sending to Syracuse", you mean sending to Paragon Plaster Company?

The Witness: That is right.

5095 By Mr. Steffen:

Q. How was the transaction paid for? After Oakfield had invoiced the board to you, that is, to Paragon, what happened next? A. Paragon would pay Oakfield.

Q. That is right. A. And Oakfield would pay Kelley. Now to get this absolutely correct, in this period sometime there was a time when Oakfield's invoices, coming to Syracuse, would be paid by a Paragon check, with the discounts all taken, the Oakfield discounts, taken off, but paid by a Paragon check. Those invoices didn't go through the Oakfield books. There Paragon, again, was simply saving a mail transaction for Oakfield.

Q. Paragon invoiced the shipment to the dealer, is that correct? A. That is right.

Q. And the dealer would then pay Paragon? A. Yes.

Q. Now at this time, was Paragon buying board directly from Kelley? A. I don't believe so. I think this was when Paragon ceased to enjoy a jobber's discount.

Q. Was Paragon a manufacturing distributor? A. It was a distributor, and Paragon tried to claim they
5096 were manufacturers because, as a matter of fact, we were at that time the oldest manufacturers of wall plaster in existence in the country, that being sanded plaster.

Q. But did the Paragon Plaster Company obtain a source of board supply at this time on a discount basis, Paragon directly? A. I think not.

Q. And did you try at this time to buy directly at a discount, and by "directly" I mean from Universal or Kelley or any other company? A. I think from Universal, at least just prior to this.

Q. And what happened there? A. To the best of my recollection, we were notified that all Paragon purchases would have to be made through the Oakfield company if a discount were to be enjoyed, or at least Oakfield was the only company who could enjoy a manufacturer's discount, and Paragon was out.

Q. And has Paragon ever been able to buy, since that time, on a discount basis? A. No, sir.

Mr. Bromley: You mean board, of course?

Mr. Steffen: I mean board, of course—and from the defendants.

Mr. Bromley: I renew my motion to strike out
5097 Exhibit No. 564. It is now completely apparent that the reference in the paragraph referred to by Mr. Steffen, the second paragraph, "It is understood he will sell at the prices which we will supply", is a direction, if it is anything, to the Paragon Company, and not to Oakfield, since, as the Presiding Justice developed, there was a sale by Kelley to Oakfield, and a sale by Oakfield to Paragon, and a sale by Paragon to the dealer. Mr. Miles was the employee of Paragon, and the second paragraph, not only on its face but as now interpreted by the witness, is plainly a direction to Paragon, if it is a direction.

Justice Stephens: I don't see what the exhibit, as explained, has to do with the charge of resale price fixing by Oakfield.

Mr. Bromley: I think it has been plainly demonstrated that it has nothing to do with that.

Justice Stephens: And as to the elimination of jobbers, as to that charge, if you are trying to prove by this exhibit that Paragon was eliminated as a jobber—

Mr. Steffen: (Interposing) We are not, Your Honor.

Justice Stephens: I see.

Mr. Steffen: This exhibit is offered, and this testimony is offered, purely for the purpose of showing that the defendants were endeavoring to influence and coerce the Oakfield Gypsum Products Corporation in its resale
5098 policies, and to require that the Oakfield Gypsum Products Corporation, in making its sales—although in this case it made them through the medium of the Paragon Plaster Company—was required to get a fixed dealer price in making sales to dealers.

Mr. Bromley: That is the same point, all over again, which has been ruled upon.

Mr. Steffen: I think the transaction is considerably clearer in this case, Your Honor.

Justice Stephens: I am sorry, Mr. Steffen, but we don't any of us, here on the bench, see that it tends to prove resale price fixing by Oakfield, and the motion to strike Exhibit 564 is granted.

(Government's Exhibit No. 564, previously received in evidence, was stricken from the record.)

Mr. Steffen: I offer Exhibit 564 upon the second ground which I mentioned just before recess, which I think is much more clearly developed at this point, that Oakfield and Paragon Plaster Company were substantially one concern, so far as these sales were concerned, and that the actual sale, the actual transaction between a licensee and its buyer, was a sale between Kelley and Oakfield. As the witness has testified, that is the only way upon which board could be procured at a discount during this
5099 time. Therefore, if you identify the Paragon Plaster Company and the Oakfield Gypsum Products Corporation as being substantially one concern, and regard it as Oakfield rather than as Paragon, you have a case of a resale by the Oakfield Gypsum Products Corporation at maintained or fixed prices dictated by the Kelley Plasterboard Company, in this case.

It is true that it constitutes a subterfuge, but it is not our fault that that is the case.

Mr. Bromley: That is subject to the same objection as that offer was this morning, it is the same thing over again.

Justice Stephens: It seems to the Court to raise exactly the same question as Exhibits 560 and 561.

The proof yesterday, by this witness, was that the two Paragons and the American Hardwall were the parents of Oakfield. The theory would seem to be there that Oakfield had to act at their instance. This is offered on just the opposite theory. The Government must at least be

consistent in its assertion of fact. If it is offered to prove, contrary-wise, that the two Paragons and American Hardwall were accomplishing resale price fixing through Oakfield, as their creature, then it isn't within the charge, because they are not charged with resale price fixing.

The objection to this exhibit as reoffered, Exhibit 564, is sustained.

By Mr. Steffen:

5100 Q. Did there come a time later, Mr. Hansen, when the Oakfield Gypsum Products Corporation made direct sales to dealers, other than to the two Paragon companies and the American Hardwall Plaster Company? A. Yes, sir.

Q. And about when was that? A. I can only give an approximate time. I think it was in 1931. It might possibly have been in 1932.

Q. How do you fix that in your memory? A. That was at a time when we thought it necessary to expand, when Oakfield felt it necessary to expand its sales, and was able to pick up a salesman who had formerly been with the Niagara Gypsum Company, and then for a short time with the United States Gypsum Company, and who had a knowledge of trade in areas where neither of the three companies, Paragon, Paragon of Scranton, and American Hardwall, were then selling.

Q. And what territory did the Oakfield Gypsum Company sell in? A. Western New York, parts of Pennsylvania, the District of Columbia, Maryland, Virginia—that is the approximate territory.

Q. I now show you Government's Exhibits Nos. 565, 566 and 567, the same being as follows: 565 being a letter purporting to be written by Mr. Kelley to Mr. Emil
5101 Hansen, under date of August 19, 1932; 566 being a letter dated August 22, 1932, entitled, "Supplement to Board License Bulletin No. 3"; and 567 purporting to be a carbon copy of a letter written to S. J. Kelley Company, under date of August 22, 1932, bearing the initials "EH" in the lower left-hand corner.

(The documents referred to were marked as Government's Exhibits Nos. 565, 566, and 567, respectively, for Identification.)

By Mr. Steffen:

Q. Have you examined Government's Exhibits 565, 566, and 567? A. Yes.

Q. Can you identify Government's Exhibit 565? A. Yes, sir.

Q. Is that a letter that you received? A. That is right.

5102 Q. And can you identify Exhibit 566, which is entitled, "Supplement to Board License Bulletin No. 3"? A. By putting it together with the letter, with Exhibit 565—

Q. (Interposing): We want your present recollection, Mr. Hansen? A. My present recollection is that I received this bulletin, or one similar to it.

Q. Enclosed in the letter of August 19th? A. Well, I can only assume that it was enclosed in the letter of August 19th.

Q. You will note that the dates are different? A. Pardon?

Q. I say you will note that the dates are different. A. That is right.

Q. Now is Government's Exhibit 567 a letter which you wrote, or a copy of a letter which you wrote? A. That is correct, it is.

Q. Now, Mr. Hansen, what price bulletin is referred to in the letter of August 19th, Government's Exhibit 565, if you know?

Mr. Bromley: I object to that because it has to do with a written document not yet in evidence. This is, of course, the same problem as before. This again only refers to the Paragon Plaster Company. It is just another at-

5103 tempt to try to prove something against Paragon.

Mr. Steffen: We have been attempting all day to prove something against Oakfield.

Justice Stephens: Well, the first problem is that this bulletin, Exhibit 566, dated August 22nd, is dated at a date which makes it chronologically impossible that it could have been included in the letter of August 19th.

Mr. Steffen: I am asking the witness if he knows what price bulletin was referred to in the letter of August 19th.

Justice Stephens: If you know you may answer that question; the objection is overruled.

The Witness: Ask me that again, please?

By Mr. Steffen:

Q. What price bulletin was referred to, if you know, in the letter of August 19, 1939? A. I think that by that is meant this bulletin which is dated August 22nd.

Mr. Bromley: I move to strike that answer as a pure speculation. It obviously cannot be that, and all the witness is doing is speculating about it.

Justice Stephens: That motion is granted.

By Mr. Steffen:

Q. Let me ask you this question, Mr. Hansen. Did the Kelley Plasterboard Company supply retail price bulletins to you or to the Oakfield Gypsum Company during
5104 this time? A. Yes, we had requested them to send us their prices from time to time, whenever they made changes, both to Oakfield and to Paragon.

Q. And those prices were the same prices at which Kelley sold to dealers in the market?

Mr. Bromley: I object to that on the ground that it is a speculation again.

Justice Stephens: Do you know?

The Witness: I think I could answer that "yes", because they were frequently headed, "Salesmen's Bulletins".

By Mr. Steffen:

Q. And did you have any trade information as to what prices Kelley was selling at? A. No.

Q. Did your salesmen know? A. Except as our salesmen would pick up that information.

Q. And was the Oakfield Gypsum Products Corporation selling at the same prices as Kelley was selling at during this period? A. Of course I couldn't know exactly what Kelley was selling at. We endeavored to sell at the prices that he said were his current prices, for the respective markets.

Q. And you asked him for his prices? A. That is right.

Q. Did he send you his prices? A. Yes.

5105 Q. And by "you" I mean the Oakfield Gypsum Products Corporation? A. Both Oakfield and Paragon.

Q. Mr. Hansen, when you received prices from the Kelley Plasterboard Company was the letter addressed to you, or how was the letter addressed?

Justice Jackson: When who received a letter?

Mr. Steffen: Let me ask it in another way.

By Mr. Steffen:

Q. When prices were received from the Kelley Plasterboard Company how was the letter addressed?

Mr. Bromley: I object to that as a speculation; let's have the letter.

Mr. Steffen: I am asking for the general practice, your Honor.

Mr. Bromley: I don't see how he can testify to that. The only letter that has been produced is addressed to Paragon.

Justice Stephens: I think we ought to have those letters if they are available, or the absence of them accounted for, and the witness then testifying as to what was in them. This is a point which may or may not involve the Court's previous rulings.

If the letters were directed to Oakfield, and stipulated Oakfield's resale prices, then they may be relevant
5106 and material within the charge. But if they relate to Paragon, then they are not. And we ought not to bridge that by ambiguous statements or by mere recollection of the witness, if the documents are available. Aren't they available?

Mr. Steffen: We do not have the price bulletins that go way back to 1932, your Honor. We have the testimony of the witness that he did receive prices, and we have the present letter which indicates that a bulletin was furnished.

What I am now wanting the witness to testify to is as to how they were received, whether they were received by Oakfield, or by Paragon, or how.

Justice Stephens: Well, that in effect is asking how they were addressed. Now if you can demonstrate that the originals are not obtainable, and that the witness has a dependable memory of the contents and the addressees, then you can ask the witness. But the "best evidence rule" has been invoked and we must apply it.

By Mr. Steffen:

Q. Referring to Government's Exhibit 565, Mr. Hansen, did you understand that as conveying price information applicable to your company alone, or to your company and Oakfield?

Mr. Bromley: I object to that because it calls for the construction of an unambiguous written document, which is not in evidence.

Mr. Steffen: The question now is relating to a
5107 particular document.

Justice Stephens: Just a minute, let me read it again.

We think that objection should be overruled. That comes within the rule that I made clear just after we came on the bench this afternoon, that even though a letter may be

clear on its face, if the parties dealing with the letter, sending and receiving it, had a different understanding of it, and the trade arrangement was that it meant to apply to Oakfield rather than to Paragon, or to both, that can be testified to. We are not receiving it as evidence of resale price fixing by Paragon, as that isn't charged.

Read the question to the witness and let him answer it, Mr. Reporter.

(The Reporter read the pending question)

The Witness: My answer to that is that I think this specifically applied to Paragon for this reason, that in about 1931, when Oakfield became interested in direct selling, Mr. Eldred took charge of the sales, he became sales manager, in effect, and our salesman, Mr. Earl North, reported directly to him. So he had to assemble all price information for the various markets because my company was not interested in areas in Western New York, or in Pennsylvania, or in Maryland, and therefore I would not have handled sales correspondence that involved Oakfield's direct sales to dealers.

Mr. Bromley: When you said Western New York
5108 you meant Eastern New York, did you not?

The Witness: I meant Western New York, sir.

Justice Stephens: The witness seems to know his own mind, Mr. Bromley.

Mr. Bromley: I don't know mine. (Laughter)

By Mr. Steffen:

Q. Did you talk with Mr. Kelley at the time that the Oakfield people commenced buying board from the Kelley Plasterboard Company? A. Yes sir.

Q. And do you recall any discussion with him as to the price at which the Oakfield people would resell to dealers? A. I don't remember that we had any such discussion. We had a long-established record of selling; we had sold board for a great many years, competitively, in the market. Our competition was on salesmanship and on quality of material, and not on price.

Mr. Bromley: I move to strike out that answer in so far as the last part of it is concerned; all parts not having to do with his conversation with Kelley.

Mr. Steffen: I don't see any basis for that, your Honor. The only possible basis would be that it was not responsive.

Justice Stephens: Read the question and the answer.

(The reporter read the record as requested)

Justice Stephens: Do you object to it as incompe-
5109 tent or irrelevant or immaterial, that portion of the answer to which you do object?

Mr. Bromley: I object to it as immaterial.

Justice Stephens: I think that objection is well taken.

Mr. Steffen: May I be heard on that, your Honor?

Justice Stephens: Yes.

Mr. Steffen: That answer is, in effect, saying that there wasn't any need to discuss prices for the reason that Mr. Hansen's firm had a long-established record of maintaining prices, and that their competition was not on a basis of price. Therefore, it is extremely material, I should say.

Justice Stephens: I am afraid I am somewhat confused as to what the Government is really trying to prove here, Mr. Steffen.

Mr. Steffen: What we are trying to prove at this point is that the Oakfield Gypsum Products Corporation received prices from Kelley, and that they resold to dealers at Kelley's prices.

Mr. Bromley: Do you contend that that is illegal, Mr. Steffen?

Mr. Steffen: We contend that it is illegal if it is done by an arrangement with Kelley, and if Kelley influenced or induced or directed or controlled the price at which the resales were made. The previous documents that have been excluded, such as Government's Exhibit 560, for example,
would be a direct showing of control of resale prices,
5110 and we do contend that is illegal.

Justice Stephens: Read Mr. Steffen's statement in answer to my question as to what the Government was attempting to prove here.

(The reporter read the record as requested)

Justice Stephens: You intend to follow it up, do you, by proof to the effect that there was something coercive or controlled or induced about this?

Mr. Steffen: Yes, although we consider that the mere fact of selling at exactly the same prices, and on exactly the same terms and conditions, would be circumstantial evidence in and of itself that they were in effect required or persuaded or induced to sell at those same prices.

Justice Stephens: Well, it might have some relevance. Standing alone it would seem to me hardly to be conclusive proof on that subject. It might be an accidental economic consequence; it might be the necessity of meeting

competition; or it might be as the result of control. If the theory here is to prove that there is resale price fixing compelled, or induced, or controlled by Kelley, I suppose the answer may stand as having some relevance to that subject.

The objection is overruled.

The Court would like to make clear that its practice that non-responsive answers shall be stricken out only on the motion of the lawyer asking the question, does not
5111 foreclose the opposite party from objecting to answers which, in addition to being non-responsive, are immaterial, incompetent or irrelevant; and the Court will ask the witness to bear in mind that so far as the witness can clearly give an answer to a question, without explaining the reasons for the answer or going beyond what is a necessary answer, that he should do so.

Then, if counsel on either side need to know the reasons, they will ask for them.

In other words, make your answers as direct as you can and as concise as you can, Mr. Hansen. That doesn't mean that you have to answer everything "yes" or "no", or that you must give an answer which you don't think adequately and truthfully gives your state of mind. You must feel free about that at all times.

Mr. Steffen: Would you care to take the afternoon recess at this time?

Justice Stephens: Yes, we will [redacted] few moments at this time.

(Whereupon, a short recess was taken, after which the trial was resumed, as follows:)

5112 Justice Stephens: Proceed.

By Mr. Steffen:

Q. The Oakfield Gypsum Products Corporation would be selling in competition with what companies, Mr. Hansen, if you know?

Mr. Bromley: At what time?

Mr. Steffen: In about 1932.

The Witness: National; United States Gypsum; Ebsary; Paragon Plaster Company; Paragon Plaster and Supply Company; and American Hardwall Plaster Company in some cases.

By Mr. Steffen:

Q. What could you say as to your familiarity with the prices of those concerns, to dealers?

Mr. Bromley: On what products?

Mr. Steffen: This is on board.

The Witness: This is a question as to my familiarity with those prices?

By Mr. Steffen:

Q. Yes. I was wanting to ask you whether your company kept advised of the prices of those companies. A. I could only testify as to the markets in which Paragon was actively interested after 1931.

Q. What markets were they? A. They were mostly New York State and New England.

Q. And to those states and places, you were
5113 familiar with the sales prices of the companies that you have named in the sale of board? A. Oh, I couldn't say that. I knew generally what they were, or I tried to know.

Q. When you told us a few moments ago that your company had a reputation, or had a policy of competing on a basis of service, not on a basis of prices, what did you mean—did you mean to say that you would maintain substantially the same prices or identically the same prices, as the other companies selling in your territory?

Mr. Bromley: If this refers to Paragon, I object to it as immaterial, and I assume it does refer to Paragon.

Mr. Steffen: I think it refers to Paragon, your Honor, at this point. It may be preliminary, although the witness has testified that he has no familiarity with sales by Oakfield after 1932—Is that correct?

The Witness: As to the details of sales, that is correct.

Justice Stephens: The Court will sustain the objection so far as the questions go to the prices of Paragon. That has been clearly ruled as out of the case. If you know what the prices of Oakfield were generally, or in detail, say so.

The Witness: Not in detail, I do not.

By Mr. Steffen:

Q. Could you state the general policy of whether
5114 they would or would not abide by the same prices that the Kelley Plasterboard Company was making?

Mr. Bromley: I object to that as leading and also as incompetent as far as the use of the word "abide" is concerned.

Mr. Steffen: I will say "follow" then.

Justice Stephens: The objection is sustained. Ask the witness what the policy, if any, of Oakfield, was, if he knows, with respect to its own prices and the prices of its competitors.

By Mr. Steffen:

Q. Can you answer the Court's question? A. The policy of the Oakfield Company was to obtain the top market price that it could find, that its competitors were selling at.

Q. And when you say "obtain", you mean obtain from dealers? A. Pardon me?

Q. Obtain from whom? A. Well, obtain from dealers or obtain from the company from whom Oakfield was purchasing, and distributing.

Q. Making the question apply only to board, you were buying board from Kelley, were you not, the Oakfield people were? A. Oakfield was buying from Kelley principally. I would say that they were buying from Kelley almost exclusively.

5115 Q. And can you say whether or not they got prices from Kelley on the sale of that board to dealers?

Mr. Bromley: I object to that as leading, and also as incompetent because calling for a conclusion.

Justice Stephens: Well, the question as phrased, does imply that the prices were the prices determined by Kelley for Oakfield, and the question is leading. The objection is sustained.

Ask the witness what his prices were and what relationship, if any, they bore to Kelley's prices.

By Mr. Steffen:

Q. What were the Oakfield Gypsum Products Corporation's prices during these years 1932, 1933 and 1934, and what relation did they bear to Kelley's prices? A. To the best of my experience, they were based on Kelley's prices, because that was the way we bought our material.

Q. Will you explain that, please? A. Yes, sir. We would have no way of knowing what margin of profit we were making unless we knew what the delivered price was in any particular market. Therefore, if Oakfield were making a sale in Western New York, they would have to know what Kelley's delivered price to a dealer would be there, because

on that basis Oakfield's discount applied, on the basis
5116 of the net after Kelley's freight was deducted. That is when Oakfield's discount started to apply. That was the margin of profit, of gross profit.

Q. And did you want to know those prices before you actually sold to the dealers? A. We had to know them.

Q. Before you sold? A. That is right.

Q. You learned after the invoice was sent you, when Kelley invoiced it to you he invoiced it at his prices to dealers, did he not? A. That is right.

Q. But at the time you sold to those dealers, you wanted to know what the price was going to be, did you not? A. We had to.

Q. And did you get those prices? A. Yes.

Q. How? A. Well, we got them direct from Kelley.

Q. Did Kelley ever make a complaint against Oakfield that you were not selling at the prices which he furnished you?

Mr. Bromley: Wait a minute. I object to that as incompetent because it assumes facts not in evidence. The prices which he furnished were the prices which he was to charge, according to the testimony of the witness.

Mr. Steffen: That is right.

5117 Mr. Bromley: The prices which were furnished were the prices which Kelley was to charge Oakfield. Therefore the question assumes facts not in evidence.

Mr. Steffen: The witness testified, I believe, that he received prices before he made his contracts. After he made his contracts, of course he would be invoiced.

Justice Stephens: But your question is as to whether or not Kelley made a complaint that Oakfield did not sell at certain prices.

Mr. Steffen: That is right.

Justice Stephens: That isn't what the witness testified about. It assumes that he did. The objection is sustained to the question as phrased. You may ask it in another manner.

By Mr. Steffen:

Q. Did the Oakfield people sell at the prices appearing on the Kelley invoices, or rather on the Kelley price lists? A. I couldn't answer that.

Q. Was that your policy, or was it not? A. That was the policy.

Q. And did Mr. Kelley ever make a complaint that you

did not abide by your policy; did he ever complain that you were cutting prices? A. I think that I had some conversation with Mr. Kelley once as to competing with one
5118 of his customers in New York City under this Miles thing. Now this is Paragon that is talking. I had some complaint that the price was not correct, was not competitive with his to one of his customers. At least, he asked me at what price we were selling.

Justice Jackson: At what price Paragon was selling?

The Witness: Yes.

Mr. Bromley: I move to strike out the answer as immaterial.

Mr. Steffen: I claim the answer, Your Honor, simply for the relevance that it has to show the attitude that Mr. Hansen would have in the Oakfield sales. I don't regard it as very weighty, but if he receives a complaint from Kelley on his resales by Paragon, it indicates that Kelley might make the same complaint if it were a sale by Oakfield.

Justice Stephens: The objection is sustained. The answer may go out so far as it relates to Paragon.

By Mr. Steffen:

Q. Did the Oakfield Gypsum Products Corporation sell through commission men during the years 1932 and 1933? A. I don't believe I can give you a competent answer on that. Mr. Eldred handled all selling arrangements.

Q. Well, I show you what has been marked as Government's Exhibit No. 568, which purports to be a copy of the minutes of an executive committee meeting of the
5119 Oakfield Gypsum Products Corporation under date of November 9, 1932, and purports to be signed with your name.

(The document referred to was marked as Government's Exhibit No. 568, for identification.)

(Government's Exhibit No. 568 was handed to the witness.)

By Mr. Steffen:

Q. I call your attention particularly to the second paragraph of those minutes. A. Yes.

Q. Can you identify Government's Exhibit 568 as a copy of the minutes which you prepared and signed? A. Yes, sir.

Q. Can you tell us what it meant by the second paragraph in regard to the sales by commission men?

Mr. Bromley: I object to that as incompetent, because calling for the construction of a written instrument which is not in evidence, and which is clear on its face.

Justice Stephens: That objection seems to the Court well taken. By the Court's ruling, Mr. Steffen, that in some situations where written instruments have a different meaning to the parties thereto, than appears on their face, the Court does not mean to open the door to having a witness describe, as to every document, what it means, if it is clear. If it is clear, as this seems to be, there is
5120 no point in having it explained. You may refresh the recollection of the witness if you wish to and—

By Mr. Steffen:

Q. (Interposing) Do you recall that matter of the sales of wallboard by salesmen on a commission basis being brought up at some time through the executive committee? A. I recall a letter from one gypsum company to the Paragon Plaster Company, asking what its policy was—

Mr. Bromley: (Interposing) I object to his stating the contents of a letter to Paragon, the letter not being in evidence.

Justice Stephens: That objection is sustained.

By Mr. Steffen:

Q. I will now show you Government Exhibit 569, Mr. Hansen, which purports to be a letter from Mr. Krumholz, addressed to you under date of November 14, 1932.

(The letter referred to was marked as Government's Exhibit No. 569, for identification.)

(Government's Exhibit No. 569 for identification was handed to the witness.)

By Mr. Steffen:

Q. Can you identify Government's Exhibit 569 for identification, Mr. Hansen? A. Yes, sir.

5121 Q. And does that refresh your recollection as to the matter of commission men and as to whether any complaint was ever made against your company concerning sales through commission men?

Justice Jackson: Against which company?

Mr. Steffen: The Oakfield Gypsum Products Corporation now, your Honor.

The Witness: Well, this letter has reference to the Paragon of Syracuse and the Paragon of Scranton.

Mr. Steffen: That is right.

Justice Stephens: I don't understand that. Is this the letter of November 14, 1932, signed by Krumholz, treasurer of the Universal Gypsum and Lime Company?

The Witness: Yes, sir.

Justice Stephens: It is addressed to Emil Hansen, vice president of the Oakfield Gypsum Products Corporation.

Mr. Reporter, will you read the witness' previous answer?

(The record was read by the reporter.)

By Mr. Steffen:

Q. Were you perhaps mistaken on that, Mr. Hansen, because the letter is addressed to you as vice president of the Oakfield Gypsum Products Corporation? A. May I read the letter?

Q. Well, you don't need to read it aloud. You may read it to yourself.

5122 Justice Stephens: We have all read it. We have it before us. I just don't understand your answer. What is there in the letter that indicates that it refers to the two Paragon companies?

The Witness: It states, "I have received advice from Mr. Eldred that his branch of your organization (that is American) has no salesmen operating on a commission basis and he explains that he is not acquainted with the procedure of either your or Mr. Merriman's company"—that is the Paragon of Syracuse and the Paragon of Scranton.

Justice Stephens: In other words, by Eldred's "branch" is meant Paragon?

The Witness: No, that is the American Hardwall Plaster Company.

Justice Jackson: I thought he was the sales manager for Oakfield.

The Witness: He also was, and it may have been that he meant Oakfield when he spoke of Eldred, as well, I don't know.

Justice Stephens: I see.

The Witness: The other is a direct reference to the two Paragon companies.

Justice Stephens: Because of Mr. Merriman's connection?

The Witness: Because of Mr. Merriman's connection with Paragon of Scranton, yes, and because of my connection with Paragon of Syracuse.

5123 By Mr. Steffen:

Q. As I understand it, now, you are regarding the Paragon Plaster Company as a branch of the Oakfield Gypsum Products Corporation? A. Not I—Mr. Krumholz may have been.

Q. But you understood him to mean that? A. I understood what he meant.

Q. At this time, did the Oakfield Gypsum Products Corporation have salesmen paid on a commission basis, do you know? A. I don't know whether Oakfield did or not, on this date.

Q. Do you recall whether this matter was brought up before the Executive Committee of the Oakfield Gypsum Products Corporation? A. Yes, sir.

Q. And was that brought up as a matter having to do with the Oakfield Company or with the three parent companies? A. It was a matter of what the three parent companies were doing.

Q. It had nothing to do with the Oakfield Gypsum Products Corporation? A. I don't recall that it did.

Q. I would like to have you look at the reverse side of Government's Exhibit 568, which purports to be a copy of the minutes of a meeting held December 12th and
5124 13th, 1932, and which is signed by you. Can you identify that as your signature, Mr. Hansen? A. I can, yes.

Justice Stephens: That is, in this file, as a separate instrument. I suppose that is because of photostating?

Mr. Steffen: Yes.

Justice Stephens: But it actually appears on the reverse, does it, of Exhibit 568?

Mr. Steffen: Yes.

Justice Stephens: Thank you.

By Mr. Steffen:

Q. I would like to have you look only at the fourth paragraph, Mr. Hansen.

Will you state, Mr. Hansen, whether you at any time—and when I say "you" I mean the Oakfield Gypsum Products Corporation—felt insecure as respects your source of supply of board?

Mr. Bromley: I object to that as incompetent because calling for a conclusion.

Justice Stephens: I don't see the relevancy of it. It may be connected, I suppose. What was the nature of the objection?

Mr. Bromley: That it was incompetent because calling for a conclusion.

Justice Stephens: I don't think that objection is well taken, if that is the only objection. That is the kind
5125 of a conclusion, it seems to me, that a business man could properly draw with respect to his company and its source of supply.

Mr. Bromley: Well, I object to it on the ground that it is leading.

Justice Stephens: Sustained.

By Mr. Steffen:

Q. I refer you to the matter of the several changes that you made in your source of supply, as you have testified, and ask you whether or not you felt secure in the source that you had with the Kelley Plasterboard Company?

Mr. Bromley: Objected to as leading.

Justice Stephens: We will have to sustain that objection. If you want to bring out from this witness whether or not they built a plant of their own, or what actuated them in considering building a plant of their own, you may do so by direct examination, but you have no right to lead.

By Mr. Steffen:

Q. Did you ever consider building a plant of your own? A. A board plant?

Q. Yes. A. Yes.

Justice Jackson: That is Oakfield?

The Witness: Yes.

By Mr. Steffen:

5126 Q. And at about what time, Mr. Hansen? A. Our original plans in 1920 contemplated that, and we had the space arranged for it.

Q. And were you considering it as late as 1932? A. Yes.

Q. And could you tell me why it might have been brought up in 1932? A. Our business was expanding. We were selling in markets that were competitive with other manfacturers. It was a matter of knowing that you were going to be protected in your source of supply, and also of being

able to make a profit on your board instead of taking a loss on it.

Q. What do you mean by that, Mr. Hansen? A. I mean by that, that the discounts that were given to us as manufacturers, to Oakfield as manufacturers, were not sufficient to compensate for the warehousing of the board at Oakfield, and reshipping it, plus the additional expense of overhead and administration.

Q. And what were those discounts? A. 15 percent on wallboard and 12-1/2 percent on gypsum lath.

Q. Did anything come of your plans, or of your thought to build a board plant? A. We had it in mind right up to the time that we sold the plant.

5127 Q. And that was when, Mr. Hansen? A. 1938.

Q. You sold it to the National Gypsum Company? A. That is right.

Q. Since that time have you purchased board at a discount from the National Gypsum Company or any other source? A. This is the Paragon Company. Oakfield ceased to exist in 1938.

Q. Yes. A. The Paragon Company has not been able to buy at a discount.

Q. Do you recall at any time having had any conversation with Mr. MacLeish of the United States Gypsum Company concerning your sales of gypsum board? A. No, sir.

Q. Do you recall at any time that Mr. Eldred or Mr. Merriman may have had such conversations and reported them to your Board? A. I wouldn't know that.

Q. I am asking you if you recall that any report was ever made to your Board? A. Of a talk with Mr. MacLeish?

Q. By Mr. Eldred or Mr. Merriman, yes. A. Not to my knowledge, not to my recollection.

Q. Well, I show you what has been marked as Government's Exhibit 570, which is a copy of the minutes
5128 of the Executive Committee of the Oakfield Gypsum Products Corporation dated May 29, 1933, and ask if that refreshes your recollection?

(The document referred to was marked as Government's Exhibit No. 570, for identification.)

(Government's Exhibit No. 570 for identification was handed to the witness.)

Justice Stephens: There is some doubt about the date of this. In the second line it states it to be the minutes

of the meeting of the Executive Committee held on May 23; and at the bottom the date is given as May 29, 1933. The date of May 29th apparently has to do with a concurrence.

This was marked Government Exhibit 206 in the previous trial, is that correct?

Mr. Steffen: Yes, sir.

Justice Stephens: It is the exhibit of which the first two lines are:

"Minutes of the Meeting of the Executive Committee of the Oakfield Gypsum Products Corp. held at Scranton, Pa., on Tuesday, May 23rd.", is that right?

Mr. Steffen: Yes.

Justice Stephens: What number is this?

Mr. Steffen: 570.

By Mr. Steffen:

Q. I call your attention particularly to the first full
5129 paragraph, Mr. Hansen? A. Yes, sir.

Q. Does that refresh your recollection as to any time at which there was a report by Mr. Eldred concerning a conversation he had had with Mr. MacLeish? A. No.

Q. Do you recall at any time whether you opened your books to Mr. MacLeish to make an audit? A. Not to the best of my knowledge.

Q. Do you know any reason why Mr. MacLeish should be offered an opportunity to look at your books, and by "your books" I mean the books of the Oakfield Gypsum Products Corporation? A. I wouldn't know the reason for that, no.

Q. Do you know of any complaints placed against your company having to do with sales through commission men or in any other way concerning which Mr. MacLeish might object? A. Well, I don't know why Mr. MacLeish would object, sir. I knew Mr. MacLeish in 1931 or 1932 as an attorney for the United States Gypsum Company.

Q. That is right. A. But not well at all. I had met him once or twice.

Q. My question may have been poorly phrased. Do you know of any complaints against your company in which the United States Gypsum Company and Mr. MacLeish might be so interested that you would throw your
5130 books open to allow them to look at them? A. I don't know of any.

Q. Looking at this Exhibit 570, does it refresh your recollection at all as to anything that Mr. Eldred may have reported to your committee? A. He may have, but I don't remember.

Q. Will you turn over to the other side of Government's Exhibit 570 and please read that paragraph and see if that refreshes your recollection?

Justice Stephens: So we are clear what you are looking at, does this also purport to be the minutes of the Executive Committee of the Oakfield Gypsum Products Corporation?

Mr. Steffen: Yes.

Justice Stephens: Of the meeting of June 21st?

Mr. Steffen: Yes, your Honor.

Justice Stephens: Then that is a part of Government's Exhibit 570.

Mr. Steffen: Yes, your Honor.

Mr. Bromley: It is a different meeting, though.

Justice Stephens: Yes.

Mr. Steffen: It is a later meeting, your Honor.

By Mr. Steffen:

Q. Can you tell us now, Mr. Hansen, of any occasion on which complaints were made against the Oakfield Gypsum Products Corporation or on which there was a threat
5131 that your sales agreement would be withdrawn? A. The only one that I am personally familiar with is the one that I told you about that concerned Paragon, myself and Kelley: I know of no other complaint against our company or against Oakfield, to my personal knowledge.

Q. Well, can you testify that that Miles situation was the basis of a threat that was made against you that you either discontinue that type of sales through Paragon and Miles, or that your right to buy board would be withdrawn? A. I wouldn't know that, sir.

Mr. Bromley: Wait a minute—

Justice Jackson: (Interposing) He answered and said he didn't know.

By Mr. Steffen:

Q. You couldn't say? A. I couldn't say.

Q. Do you have any present recollection as to whether there was a time in 1932 when you felt that you might lose your source of supply? A. We felt insecure from 1920 until 1938, as to our source of supply.

Q. And can you say why? A. Sir?

Q. Can you say why, in more detail than you
5132 have so far? A. Because no other manufacturer wanted to develop a live competitor.

Q. And you were a live competitor? A. I hope so.

Q. And your sales took business away from the other companies? A. I think that that is a correct statement, yes.

Q. Did you maintain their prices?

Mr. Bromley: I object to that as calling for a conclusion. I don't think the use of the word "maintain" is proper.

Justice Stephens: That objection is sustained. Ask the witness what his prices were and what he did, and what his reasons were. This is your witness and you ought not to lead him.

By Mr. Steffen:

Q. Can you give any other conclusions having to do with prices or in any other way that would make you feel insecure in 1932? A. It would be conjecture on my part.

Justice Stephens: Don't conjecture.

The Witness: I have no reasons.

Mr. Steffen: Your Honor, I think possibly the conjecture of Mr. Hansen might be quite relevant if it went to show what Mr. Hansen's attitude was as of this time, 1932.

Justice Jackson: Why don't you ask him what his
5133 attitude was? Conjecture can't prove anything or tend to prove anything.

By Mr. Steffen:

Q. What was your attitude? Did you feel insecure, particularly in 1932?

Mr. Bromley: I object to that on the ground that that question has already been ruled upon and excluded. It is repetitious and also incompetent.

Justice Stephens: Well, it is incompetent as leading, and it has been answered once or twice by the witness in his own words, that he did feel insecure. The objection is sustained.

By Mr. Steffen:

Q. You told us just now that you didn't think any company would want to develop a live competitor. Can you tell us whether your sales through commission men extended your business, in your opinion?

Mr. Bromley: What company is this, please?

Mr. Steffen: The Oakfield Gypsum Products Corporation.

Mr. Bromley: He testified that he didn't know whether they had commission men or not. I object to it as assuming facts not in evidence.

By Mr. Steffen:

Q. How was Mr. North paid—

Justice Stephens: (Interposing) The objection is
5134 sustained.

By Mr. Steffen:

Q. How was Mr. North paid, do you know? A. I don't recall whether it was a salary and commission or a straight salary, Mr. Steffen.

Q. Did you sell through jobbers—and I am speaking of the Oakfield Gypsum Products Corporation? A. Did Oakfield sell through jobbers?

Q. Yes.

Mr. Bromley: Do you mean did they sell board, Mr. Steffen?

Mr. Steffen: Yes.

The Witness: Board?

By Mr. Steffen:

Q. Yes. A. May I ask what you define as a jobber, how you define a jobber? (Laughter)

Q. Yes. A jobber is one who buys in wholesale lots from a manufacturer and sells at a discount to dealers at dealer prices. A. One who buys at a discount?

Q. From the manufacturer and sells to dealers.

Justice Stephens: Mr. Hansen, perhaps the Court ought to explain to you that this laughter is not directed at you. The laughter is due to the fact that there has been a great deal of debate and explanation in this case by various
5135 witnesses as to what a jobber is.

The Witness: Well, the answer to that question is no, other than the three companies, Paragon, American Hardwall, and Paragon of Scranton. That is in reference to board, is it not?

By Mr. Steffen:

Q. Yes. A. All right.

Q. Did you ever have a jobber arrangement with reference to plaster? A. Yes, sir.

Q. And with whom?

Mr. Bromley: I object to that as immaterial. What has this got to do with the case?

Justice Stephens: What is the materiality of this under the issues? Is there some charge that Paragon eliminated a jobber of plaster?

Mr. Steffen: No, your Honor.

Justice Stephens: I just don't see it. Perhaps I ought to. State what is the theory of the question.

Mr. Steffen: It was a preliminary question, your Honor, and it would lead to the Fairmont Wall Plaster Company.

By Mr. Steffen:

Q. Did you have any relations with the Fairmont Wall Plaster Company?

5136 Justice Jackson: And by "you" who do you mean?

Mr. Steffen: I am speaking generally as to Oakfield.

The Witness: Yes, sir.

By Mr. Steffen:

Q. And did you sell plaster to them on a jobber basis? A. Yes, sir.

Q. Did you ever sell board to them on a jobber basis? A. No, sir.

Q. Do you know Mr. Spease? A. Yes, sir.

Q. Did you ever have a conversation with Mr. Spease? A. Yes.

Q. Concerning the possibility that he might buy board from you, and by "you", I mean Oakfield Gypsum Products Corporation? A. Concerning the purchase of mixed cars of material shipped from Oakfield, principally plaster in his bags.

Q. Did he also try to buy board from you? A. Yes, sir.

Q. And did you agree to sell him board at a discount in wholesale lots, for resale to dealers? A. No, sir.

Mr. Bromley: I object to that as leading.

Mr. Steffen: I think it is a specific question, merely.

Justice Jackson: He answered no.

5137 Justice Stephens: It is certainly leading. The Court has sustained many objections to leading questions today, and I wish counsel would not ask them. You may ask the witness what, if any, arrangement he made

with Mr. Spease concerning the sales of board, and let him tell you in his own way.

By Mr. Steffen:

Q. You stated that you had a conversation with Mr. Spease? A. Yes.

Q. What arrangements, if any, did you make with him in regard to board? A. My conversation with him was a preliminary discussion in Buffalo, where I met him by appointment, and I told him that we would work out a contract with him to fill his bags with his brand of plaster, to load mixed cars for him containing various products, including board; and made arrangements, as I recall it, wherein we took in a car of his own lime which we stored and reloaded for him so that he would have the advantage of mixed car shipments of his own brand of material. I told him that we could not give him a discount or a commission on board, gypsum board and gypsum lath, that there was not sufficient margin in it to warrant that.

Q. Did you know at that time what Mr. Spease's prior source of board was? A. I did after I had visited
5138 with him, he told me what it was. I don't know that I knew before unless it had developed in a telephone conversation before the actual meeting. I am not clear on that.

Q. Where had he been buying board before? A. From the American Gypsum Company.

Q. Was he then, did you understand, able to buy board further from them?

Mr. Bromley: I object to this as incompetent because hearsay. . .

Mr. Steffen: I am not offering it for the purpose of proving that he did or did not buy board from American, your Honor, but I am offering it simply to show what Mr. Hansen's understanding of the situation was at the time.

The Witness: I wouldn't know that—

Justice Stephens: (Interposing) Just a moment, please, let the Court rule before you answer.

Mr. Steffen: He has already answered that he doesn't know.

Justice Stephens: Very well.

By Mr. Steffen:

Q. Mr. Hansen, did you ever have a complaint made against your company, and by "your" I mean the Oakfeld

Gypsum Products Corporation—concerning bids on Government jobs? A. Not to me.

Q. I am speaking of the Oakfield Gypsum Products
5139 Corporation. Do you know of any such complaint?

A. Not to the best of my knowledge, no. I don't know of any complaint made to Oakfield about Oakfield bidding on Government jobs.

Q. About Oakfield and the three parent companies, all four of you, bidding on Government jobs?

Mr. Bromley: I object to that question in so far as it covers the three companies other than Oakfield, as immaterial.

Justice Stephens: Well, now, didn't we go into that subject, Mr. Steffen, through another witness?

Mr. Steffen: Yes, your Honor.

Justice Stephens: Which witness was that?

Mr. Steffen: Mr. Spease.

Justice Stephens: Under what theory did the proof come in at that time? Can you refresh our recollection?

Mr. Steffen: I think it came in under the theory of control or regulation of the Oakfield Gypsum Products Corporation. The testimony developed that a complaint had been made and that Oakfield wrote to Spease saying that such a complaint had been made, and that they were not permitted to put in a series of bids of that sort.

I am asking Mr. Hansen whether that is true, or whether he remembers that occasion, and I want to ask him some further questions.

As I understand it, the United States Gypsum Com-
5140 pany was reported to have made a complaint against that thing called "multiple bidding", I believe, according to Mr. Bromley.

Justice Stephens: Well, if the question is preliminary to asking the witness about a complaint, the objection is overruled.

Justice Garrett: I understood Mr. Bromley to object to that question in so far as it referred to the companies other than the Oakfield Gypsum Company. Wasn't that your objection?

Mr. Bromley: Yes, your Honor.

Justice Garrett: That of course has been ruled on. I don't wish to criticize Government counsel, but it does seem to me that Government counsel should not keep trying to get in about these two Paragon companies and the American Hardwall Plaster Company questions that have been ruled

on—of course Government counsel has the right to make offers of proof, but is scarcely fair to the Court, having ruled again and again, to keep trying to bring in those Paragon companies and the American Hardwall Plaster Company.

I don't wish to be critical of Government counsel but it is very wearisome to have to pass again and again on those questions.

Justice Stephens: I share Judge Garrett's view. I think the record of the Government has been fully protected so that in the event of an adverse decision it can raise
5141 these matters on appeal with respect to the right to go into the Paragon question.

But I thought—I may say informally to Judge Garrett—that if the complaint had to do with both Oakfield and the other companies, perhaps the question would have to be phrased with respect to all four of them, or otherwise the complaint couldn't be referred to effectually.

What is the last question asked of the witness?

Mr. Steffen: I think the witness has answered that he doesn't remember.

Justice Stephens: Then we can dispense with this discussion.

Mr. Steffen: I would say, in reply to Judge Garrett, that there were two witnesses who might have known about some of these transactions. One was Mr. Merriman, who died about a month ago, and the other is Mr. Eldred who has been in the hospital and is now confined to his home, and he is the man that probably knows most about them.

We are endeavoring to get from Mr. Hansen what we can, and I regret that we were not able to get more evidence than we did. I regret it probably more than defendants' counsel do.

I think I am substantially finished with this witness, but I may have a question or two in the morning.

Justice Stephens: I say this in entire good part
5142 towards Government counsel, as we realize that the case is long and complicated and rests upon circumstances to a large extent, but there have been so many attempts today, when we have had to rule and rule and rerule on the same questions, leading questions and questions about Paragon, that it approaches in fact—although I am sure not in intent—an invasion of our rulings.

The remedy, if the case should ultimately go against the Government, is by appeal and not by invasion.

Mr. Steffen: Your Honor, may I ask one question at this point?

Justice Stephens: Yes.

Mr. Steffen: Perhaps I shouldn't ask the Court this, but we have Mr. Stromquist under subpoena. Mr. Stromquist can identify Government's Exhibit 560, which has been excluded. Now, on the theory of showing that what Mr. Stromquist meant may have been quite different from what Mr. Hansen understood, that exhibit might be admissible as a declaration. That is to say, you have heard the testimony so far, and have heard that there was very close dealing between Oakfield and the Paragon companies and the American Hardwall Company, and if Mr. Stromquist writes a letter and understands by it that Oakfield in its sales shall sell at resale prices, we would consider that material.

I raise that for the reason that I don't want to be
5143 accused of subterfuge here if I should again offer Exhibit 560.

Justice Stephens: We are not assuming at all to foreclose you from making any offers that you feel you must make to prove your case or to make a record in the event of an adverse decision. We will rule on Mr. Stromquist's testimony when you present him.

The court will now take a recess until tomorrow morning.

(Whereupon, at 4:05 p. m., a recess was taken until 10:00 o'clock a.m., Thursday, March 23, 1944.)

5144 IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA,

Plaintiff,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS,

Defendants.

Seventh Floor,
Internal Revenue Building,
Washington, D. C.,
Thursday, March 23, 1944.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

APPEARANCES:

(Same as heretofore noted.)

5153 You may take the witness stand, Mr. Hansen.

Thereupon, EMIL HANSEN the witness on the stand at the time of adjournment, resumed his testimony as follows:

Direct Examination (resumed)

By Mr. Steffen:

Q. You were asked the question, Mr. Hansen, referred to by the Presiding Justice just now, on page 5353 of the transcript:

"Q. And in making sales by Oakfield, at what prices would the Oakfield Gypsum Products Corporation resell to dealers?"

This applies, as you understand, I take it, to the time when Oakfield was buying board and was reselling it; and the question was as to where they were selling to dealers, at what prices were they selling.

And your answer was:

5154 "A. Would resell to dealers—unless you called the American Hardwall Plaster Company, the Paragon Plaster of Syracuse, and the Paragon Plaster and Supply Company, dealers—they were the only three customers for the gypsum products other than gypsum rock, that Oakfield had."

In the first place, that was not a responsive answer, Mr. Hansen. Did you have any other sales besides those three?

Mr. Bromley: Just a moment. I object to the question as incompetent because assuming facts not in evidence.

Justice Stephens: What page is that, now?

Mr. Bromley: Page 5353.

Counsel, instead of merely reading the question beginning at line 2, read it and then tried to interpret it. His interpretation was inaccurate, because the question referred to the time when Oakfield was buying from Universal.

Mr. Steffen: I am very glad to have it more carefully explained. I thought the witness understood the reference.

Justice Stephens: Suppose you just read the answer which he did give there.

Mr. Bromley: I suggest, in the interest of saving time, that we let the witness see a copy of his testimony.

Mr. Steffen: I would be very glad to.

Justice Stephens: Yes, that would help.

(Copy of transcript of testimony handed to the
5155 witness.)

By Mr. Steffen:

Q. Beginning with page 5353, Mr. Hansen, and carrying over to page 5356, will you look at that? A. I want to get the time factor in there.

Q. Then read preceding that, if you wish.

Justice Stephens: Take your time and read it.

I call the attention of counsel to the answer on page 5356 beginning at line 15, and running to the bottom of the page. I think probably that clears the whole thing up, and it may

not be necessary to take any further time, if counsel will agree that that clears it up.

Mr. Steffen: If Your Honor feels that it is clear, we have no desire to ask any further questions.

Justice Stephens: I feel that it is clear if the answers on page 5356, commencing with line 15 and running to the bottom of the page, are agreed upon as correct answers.

Mr. Bromley: I agree they are. I think that clears it all up.

Mr. Steffen: I would like to ask Mr. Hansen:

You have now read your testimony, I take it, so far as page 5356 is concerned?

The Witness: Yes.

By Mr. Steffen:

5156 Q. And the answers appearing on the latter half of that page, are they correct? A. That is right, they are.

Justice Stephens: That takes care of it. Thank you, Mr. Steffen.

By Mr. Steffen:

Q. While you have your testimony before you, look at page 5365, Mr. Hansen, line 15; the question there was put two ways, and you answered "No". A. That is incorrect.

Q. "No" could be an answer to either question. Which did you mean it to be an answer to? A. The answer should be, "No, we had no arrangement with Universal concerning Oakfield's sales to Paragon."

Q. Look at page 5406, now, line 20—you had better read from the middle of the page to get the gist of it.

Justice Stephens: Commence at line 6, Mr. Hansen.

The Witness: Yes, sir.

By Mr. Steffen:

Q. The question, Mr. Hansen, has to do with your answer there on lines 19 and 20. The preceding question had to do with the policy of the Oakfield Company in obtaining top market prices, and the question was:

"Q. Obtain from whom?"

A. Well, now, if you will go back to Judge Stephens'
5157 question as to the prices, my answer to the question, as indicated on line 12, was intended to be that the policy of the Oakfield Company was—

Justice Stephens: (Interposing) That answer is clear.

The answer that puzzled me, Mr. Hansen, is in lines 19 and 20. You see, I had asked you at line 6, and following:

"Ask the witness what the policy, if any, of Oakfield, was, if he knows, with respect to its own prices and the prices of its competitors."

And Mr. Steffen said:

"Can you answer the Court's question?"

You said:

"The policy of the Oakfield Company was to obtain the top market price that it could find, that its competitors were selling at.

"Q. And when you say 'obtain', you mean obtain from dealers? A. Pardon me?

"Q. Obtain from whom? A. Well, obtain from dealers or obtain from the company from whom Oakfield was purchasing, and distributing."

I don't understand what that means, that is all.

The Witness: There apparently was confusion in my mind on that question. If I had said as my intent was, in my answer on line 12, it would be: "The policy of the company was to sell at"—I used the word "obtain" there in the sense of the price that we hoped to receive for our goods.

5158

By Mr. Steffen:

Q. Now, Mr. Hansen, that policy has to do with the Oakfield's sales to dealers? A. That is right.

Q. And did that same policy obtain in your transactions between Oakfield and Paragon?

Mr. Bromley: I object to that as immaterial.

Mr. Steffen: I think that is highly material, as I will develop later, Your Honor.

Mr. Bromley: This is going into Paragon again, isn't it?

Justice Stephens: I don't see the materiality of that. But I still don't understand, Mr. Hansen, what you mean by your answer, even if you used the word "obtain" as meaning to "sell at". I can understand what you sell at, but I still don't understand this answer in lines 19 and 20:

"Well, obtain from dealers or obtain from the company from whom Oakfield was purchasing, and distributing."

I don't see how you can sell to people from whom you are purchasing.

The Witness: That is where my confusion came in. I thought that Mr. Steffen then was asking me where we got the information as to the price that we might secure from

the customer, and I changed the entire sense of it.
5159 In one case I was talking about obtaining value for my merchandise, shall I say; and then we went on to where I thought he was asking, "Well, where did you find out what that competitive price was?"

Justice Stephens: Just give us an answer to that question now, in your own way.

The Witness: The answer to that, of where I found the competitive price, or where Oakfield found the competitive price, was from the company from whom Oakfield was purchasing, and from dealers.

Justice Stephens: I see.

By Mr. Steffen:

Q. That is, you mean you wanted to get the best price possible when you were buying from Universal? A. Pardon me?

Q. Do you mean that you wanted to get the best or lowest price possible when you were buying from Universal, or your supplier? A. That wasn't the intent of the answer.

Q. Your answer had to do strictly with sales by Oakfield? A. That is right.

Q. And you wanted to get the best price possible, is that correct? A. That is right.

5160 Q. Now, I want to ask you whether that applied also in Oakfield's sales to both Paragon companies and the American Hardwall?

Mr. Bromley: I renew my objection. It seems to me that that is immaterial, on the Court's ruling.

Mr. Steffen: Your Honor, this answer will be utterly misleading if it is left this way. Oakfield did sell to the Paragon companies and to American Hardwall, and we have to know on what basis. The answer says that Oakfield sold on the best price obtainable.

Justice Stephens: Do you mean that it goes to the bona fides of the sale as between Oakfield and Paragon?

Mr. Steffen: No. I want to develop the fact that—

Justice Stephens: (Interposing) What the Court has to rule on is whether or not it is material under the issues, and I ask whether or not it goes to the attempt to show that there was not really a bona fide sale between Oakfield and Paragon—

Mr. Steffen: (Interposing) No, I don't want to show that it was not bona fide, but I want to show the extent of it, that is all. He has testified as to the policy in selling to

dealers generally. Now, the status of Paragon is ambiguous, whether as a jobber, a dealer, or what. And I am asking him the question, which I should think would
5161 be extremely material—did Oakfield's general policy apply in sales to Paragon?

Mr. Bromley: If that is offered to sustain the charge that Oakfield's resale prices were controlled, then I do not object to it. But if it is offered to go back to this old theory of trying to pierce the corporate veil—

Mr. Steffen: (Interposing) It is not, Your Honor.

Justice Stephens: I think it may come in, then, with the understanding that it is not on the theory of piercing the corporate veil. The objection is overruled.

The Witness: Oakfield's sales to Paragon were at lesser prices, at a discount from dealer's prices.

By Mr. Steffen:

Q. And did that apply also to the plaster sales?

Mr. Bromley: I object to that is immaterial.

Mr. Steffen: It is simply to round out the testimony, Your Honor.

Mr. Bromley: It is still immaterial.

Justice Stephens: Objection sustained.

By Mr. Steffen:

Q. Please refer now, Mr. Hansen, to pages 5407 and 5409 of the transcript. A. Yes, sir.

Q. On page 5409, beginning with line 16—

Justice Stephens: (Interposing) And, Mr. Han-
5162 sen, at the bottom of page 5407, commencing at line 19.

I didn't know, I may say to counsel, that this is of any materiality, and if you don't think it is, you need not take the time to clear it up. But if it is regarded by the Government as important under the issues, it would be helpful to me if, as was done with Mr. Lenci, it might be spelled out in concrete terms.

By Mr. Steffen:

Q. Could you explain in more detail what you meant by your answer beginning on line 19, page 5407?

Justice Stephens: Mr. Steffen, does this involve basing points and the like?

Mr. Steffen: I think it involves the whole matter of conformance, on the part of Oakfield, with the Kelley prices and terms and conditions of sale.

Mr. Bromley: I don't think it has any relation to basing points.

Mr. Steffen: And in so far as basing points are involved, it does have a relation to basing points.

Justice Stephens: I was confused, I confess, yesterday afternoon, as to what this was offered for. The only charge we were dealing with, I thought, was a charge of resale price fixing by Oakfield as a manufacturing distributor. For some reason or other, I didn't get the relationship of it.

Mr. Steffen: May I state the Government's purpose?

5163 The purpose was to show that the Oakfield people bought from Kelley, bought board, and they resold it to dealers, in general. And they resold it, as I understand this testimony, according to the prices which Kelley furnished them, and according to the trucking conditions and the general sales conditions which obtained in Kelley's sales to dealers; and I understand Mr. Hansen's testimony to be that. But I would be very glad to have him amplify it, if that is not correct.

By Mr. Steffen:

Q. What would you say on that, Mr. Hansen? A. I said, on page 5407, in line 15:

"To the best of my experience, they were based on Kelley's prices, because that was the way we bought our material."

Then I was asked to explain that clause, I assume.

Q. All right. Do you have any further explanation? A. No, I think that answer is complete.

Justice Stephens: Very well, the Court will not labor the matter. Perhaps it is due to the inexperience of the Judge with the details of commercial transactions.

Mr. Steffen: Well, it may very well be the fault of Government counsel in not asking intelligent questions, Your Honor. I wanted simply to develop the conformance.

5164 Justice Stephens: I am sure it will come out eventually before we get through. Perhaps it will be brought out on cross-examination, and perhaps it is not important to take any more time on it.

Thank you for taking up these matters.

By Mr. Steffen:

Q. I have a few questions, Mr. Hansen, regarding the period in 1932 and 1933 when Oakfield was buying board from Kelley. Do you recall the period? A. Yes, sir.

Q. And I think yesterday we showed you Government's Exhibit 568 for Identification, and Government's Exhibit 569 for Identification, and Government's Exhibit 570 for Identification, the first one being minutes of the Executive Committee, and the second being a letter from Mr. Krumholz, and the third also being minutes of the Executive Committee meeting of the Oakfield Gypsum Products Corporation.

Mr. Steffen: I suggest this, Your Honor, at this point: Government's Exhibit 568, which appears as being a copy of the minutes on one side,—inasmuch as there are minutes on the other side of the original, I suggest that we designate the reverse side as Government's Exhibit 568-A.

Justice Stephens: That may be done. In other words, what we have been treating as the rear of Exhibit 568, will now be marked as Exhibit 568-A?

Mr. Steffen: Yes. And the same should be done
5165 with Exhibit 570. On the rear of Exhibit 570 are the minutes of June 21, and they should be designated as Exhibit 570-A.

Justice Stephens: That may be done.

(The documents referred to were marked as Government's Exhibits Nos. 568-A and 570-A, respectively, for Identification.)

By Mr. Steffen:

Q. Let me ask you this question: From your information in the industry, and from your conversation with Mr. Spease, or from any other sources, what would you say as to the attitude of the gypsum industry concerning the use of jobbers?

Mr. Bromley: I object to that as immaterial.

Mr. Steffen: The materiality, I think, will show up, Your Honor. I would like to ask the question.

Mr. Bromley: It is immaterial to any charge in the pleadings.

Mr. Steffen: We have, Your Honor, Government's Exhibit 570-A, which speaks of the fact that at a meeting of the Gypsum Association there was a threat to withdraw—

Mr. Bromley: (Interposing) I don't think counsel ought to read these things into the record before he gets them in evidence.

Mr. Steffen: I have no desire to do that. It is merely for the purpose of saving time.

5166 Justice Stephens: Just let us look at it.

(The Court examined Exhibit 570-A.)

Mr. Steffen: May I make a little more explicit—

Justice Stephens: (Interposing) You are referring to the second paragraph, I suppose, the first sentence in the second paragraph?

Mr. Steffen: That is right.

Justice Stephens: What puzzled the Judges is as to how the attitude of the industry can be material.

Mr. Steffen: Concerning jobbers.

Justice Stephens: Yes. The charge here is the elimination of jobbers. You are entitled to try to prove the elimination of jobbers. But what the general attitude of the industry is, is something that can hardly be material.

Mr. Steffen: May I make that very clear?

Justice Stephens: Yes.

Mr. Steffen: In this case, we have the Oakfield Gypsum Products Corporation, which is a manufacturing distributor; we have testimony already by Mr. Hansen that the Oakfield Gypsum Products Corporation, after it purchased board from Kelley, sold it to the Paragon Company and to the other constituent companies, at a discount, substantially as a jobber.

Now the attitude of the industry, as has been developed here already rather fully, in 1932 and following, was
5167 to get rid of jobbers, or as Mr. Bromley would say, level off the price at which the jobbers bought so that their price would be the same as the dealer's price.

So you have a situation where the Oakfield people are buying at a manufacturer's discount, and are making use, in effect, of jobbers; and I want to develop the question whether that may not have been one reason why the source of board supply which the Oakfield people had, was being threatened.

Justice Stephens: Well, what troubles me, Mr. Steffen, is—suppose the witness answers, first, that he knows what the attitude of the industry toward jobbers was; and, second, that it was unfavorable to the jobbers,—what does that prove? What does it prove with reference to the charge of jobber elimination?

Mr. Steffen: There are two charges here, Your Honor. One is jobber elimination, and the other is Paragraph 45(e). Paragraph 45(e) is to the effect that manufacturing distributors were being coerced and induced to resell at prices, and in effect were being induced not to sell to jobbers

because the jobber price had been put at the same level as the dealer prices. And I think this evidence is very material to show the situation, that the industry wouldn't allow, or was unwilling to allow, the manufacturing distributors to sell to jobbers while they, the licensees, were not permitted to do so.

5168 I am stating that as a circumstance from which I think the Court could find that there was a threat to the continued sale by the Oakfield Gypsum Products Corporation, or the continued purchase of board by the Oakfield Gypsum Products Corporation.

Justice Jackson: I don't see why you can't bring that out by proper questions, though. Why don't you ask him what it was?

Mr. Steffen: I have asked him that.

Justice Jackson: You have asked him what the general attitude of the industry was. Why don't you ask him what they did, why were they complained against? Ask him, "According to the minutes on Exhibit 570-A, was that the reason that you thought you were threatened, because you employed men on commission, or that you wouldn't eliminate jobbers, that you continued to sell to Paragon and the other two companies?"

5169 Mr. Steffen: I was leading up to that, your Honor.

Justice Jackson: I think you can do that by specific questions.

Justice Stephens: We will overrule the objections. You may interrogate the witness concerning the attitude of the industry as a circumstance which may tend to be a part of the picture in which these operations were being carried on.

By Mr. Steffen:

Q. Mr. Hansen, did you understand the attitude of the industry as respects sales by licensees through jobbers?

Justice Stephens: Just answer that yes or no, first, whether you did know what the industry's attitude was.

The Witness: No.

Justice Stephens: The answer is no?

The Witness: That is right.

By Mr. Steffen:

Q. Did you know whether there were jobbers in the industry at that time? A. In 1931, 1932 and 1933?

Q. Yes. A. Yes.

Q. Were there as many jobbers then as there were in 1928, 1929 and 1930?

Mr. Bromley: I object to that as incompetent, because calling for a conclusion.

5170 Justice Stephens: Do you know?

The Witness: No, I do not.

Justice Stephens: The objection is sustained.

By Mr. Steffen:

Q. Was the attitude of the industry concerning jobbers the same as the attitude of the suppliers of other materials which were handled on a distributor basis by Paragon?

Mr. Bromley: I object to that as incompetent because calling for a conclusion.

Justice Stephens: The witness has stated that he doesn't know what the attitude of the industry was. That being true, it would seem useless to proceed. Sustained, unless you can develop that he knows about it.

By Mr. Steffen:

Q. You testified that the Paragon people were buying a number of types of masons' supplies and reselling as a distributor, did you not? A. That is right.

Q. And you, for a period, were buying gypsum board as a distributor, were you not? A. A distributor, or a jobber, I don't know which.

Q. And there was a time when that was discontinued, was there not? A. That is right.

Q. When was that? A. I think it was about 1930,

5171 it might have been 1931.

Q. And do you know why it was discontinued? A. No, I do not. That notification to us, as I recall, was first from the Universal Gypsum Company.

Mr. Bromley: You mean the notification that you could no longer get a discount?

Justice Stephens: Is that what you mean?

The Witness: That is correct.

By Mr. Steffen:

Q. That is you had to buy board at dealer prices or not at all? A. That is right.

Q. Now, coming to this matter of Exhibit 570-A, Mr. Hansen—Let me ask you first, did you know the attitude of the industry regarding the hiring of commission men to sell board? A. When you speak of the "industry", you mean all the companies involved in the industry?

Q. What I want to get is the industry policy or the industry practice— A. (Interposing) I know the policy as related to us by any particular company, sir.

Q. Did you have any knowledge as to what Ebsary or National or any of these other companies were doing by way of employing jobbers, or commission men? A.
5172 I don't believe so.

Q. Do you know whether or not National employed jobbers? A. Whether National employed jobbers? Now, you are referring—

Justice Jackson: (Interposing) Employed jobbers?

Mr. Steffen: Employed or sold to jobbers.

Justice Jackson: Oh.

The Witness: You are referring to this particular date?

By Mr. Steffen:

Q. Along in 1932. A. I don't know.

Q. Do you know whether or not they did at a later date? A. Well, I know that from 1938 on I wasn't able to obtain a discount on the purchase of board.

Justice Jackson: And when you say "I", you mean Paragon?

The Witness: Paragon, sir.

Justice Jackson: Paragon of Syracuse?

The Witness: That is right. Oakfield ceased to exist in 1938.

By Mr. Steffen:

Q. Did you try to get a discount? A. Yes, sir.

Q. And who did you talk to when you tried to get a
5173 discount? A. The officers of the National Gypsum Company.

Q. Which ones? Did you see Mr. Baker or Mr. Burley? A. Oh, I think it was Mr. Baker.

Q. What did Mr. Baker tell you?

Mr. Bromley: I object to that as immaterial. Isn't it perfectly plain that National's price to a jobber as of 1938 was fixed by the bulletins at the same figure as the dealer price? That has been established here time after time after time.

Mr. Steffen: I should like to have that developed, your Honor.

Mr. Bromley: What possible good can repetition of a fact that is so plain do in this case? National had no power to give a discount to a jobber because, under our bulletins,

its price to a jobber was fixed at the same figure as the price to the dealer, on board.

Justice Stephens: It has been so clearly demonstrated in the case that the bulletins were drawn in a manner which forbade, after a given time, discounts, that it would seem to us useless to keep proving it.

Mr. Steffen: If I were offering it simply to prove that, I think your Honor would be correct; but I would like to ask this witness the question in order to determine what his information was at that time, and if he received in-
5174 formation from Mr. Baker at that time indicating that their policy had been for some time not to employ jobbers, that would go perhaps back to 1932.

Mr. Bromley: The bulletin was issued in 1930.

Mr. Steffen: But Mr. Hansen doesn't know anything about the bulletins.

Justice Stephens: What does Mr. Hansen's information on the subject, whatever it may be, tend to prove under the issues of this case, which has not already been proved?

Mr. Steffen: It ought to tend to develop the position of the Oakfield Gypsum Products Corporation in the industry, and whether they were being coerced.

Mr. Bromley: Oakfield was out of business then.

Mr. Steffen: I want to find out Mr. Hansen's information concerning the employment of jobbers in the industry, and he went to Mr. Baker and had a conversation. Maybe Mr. Baker didn't tell him anything other than "we can't sell to you." But I think it is perfectly appropriate to ask him one or two questions on that.

Justice Stephens: Well, we will hear the answer and see if there is anything in it that relates to the issues. If there isn't, you may move to strike, Mr. Bromley.

By Mr. Steffen:

Q. What did Mr. Baker say to you in regard to the possibility of selling to jobbers? A. He said that it was
5175 not National's policy to sell gypsum board and gypsum lath to jobbers.

Q. Did he tell you how long that policy had existed? A. I don't recall that.

Q. Following this meeting of your Executive Committee on June 21, 1933, did you negotiate with Mr. Kelley for a contract, and by "you", I mean Oakfield? A. Mr. Eldred negotiated a contract with Kelley.

Q. Did you attend the conference at which that was negotiated? A. Yes, sir.

Q. And why did you seek a contract at that time?

Mr. Bromley: I object to that as immaterial and incompetent.

Justice Stephens: I don't quite see the force of that objection, Mr. Bromley.

What are you attempting to prove by this, Mr. Steffen?

Mr. Steffen: I am attempting to prove that Mr. Hansen's company, the Oakfield Gypsum Products Corporation, was being coerced, and that in order to get around the coercion, they thought they could negotiate a 5-year contract with Mr. Kelley.

Justice Stephens: You mean coerced to sell at the prices fixed by Kelley?

Mr. Steffen: That they felt insecure as to their purchase of board, and that one ground of their insecurity was that there was a jobber situation existing in the Oak-
5176 field organization, and there were complaints against that company; and that following the complaints they proceeded to make a 5-year contract, and I wanted to ask why.

Justice Stephens: The objection is overruled.

By Mr. Steffen:

Q. Why did you negotiate a 5-year contract with Mr. Kelley? A. As I recall, and I think you will find it correct, that contract was a reciprocal contract.

Q. That is right. A. It involved the sale of board and lath to the Oakfield Gypsum Products Corporation, and the sale of stucco, and I think also heat plaster by Oakfield to Kelley—

Q. (Interposing) I show you, Mr. Hansen—

Mr. Bromley: (Interposing) I don't think he had finished.

Mr. Steffen: I thought he had. Finish your answer, Mr. Hansen.

Justice Stephens: If you had not completed your answer, finish it. The question was why you had entered into this contract.

Mr. Steffen: I was going to show him the contract.

Justice Stephens: Let him finish his answer.

The Witness: It was our desire to assure ourselves first of a constant supply of board; second, secure a good customer for our manufactured material; and third, to
5177 get the maximum profit out of it because of the reciprocal arrangement.

By Mr. Steffen:

Q. And you wanted that arrangement for a 5-year period or as long as possible, or what? A. I think that was just good business judgment.

Justice Stephens: We will take the morning recess at this time.

(Whereupon, a 5-minute recess was taken, after which the trial was resumed as follows:)

Justice Stephens: Proceed, gentlemen.

By Mr. Steffen:

Q. I now show you, Mr. Hansen, what has been marked as Government's Exhibit 571, which appears to be a contract in the form of a letter, between the Oakfield Gypsum Products Corporation and the Kelley Plasterboard Company, dated December 1, 1933.

(The letter referred to was marked as Government's Exhibit No. 571, for identification.)

(Government's Exhibit No. 571 for identification was handed to the witness.)

By Mr. Steffen:

Q. Can you identify that, Mr. Hansen, as being Mr. Eldred's signature? A. Yes, sir.

5178 Justice Stephens: Is this the one that bears the exhibit number 208 in the upper right-hand corner, dated December 1, 1933?

Mr. Bromley: Yes, your Honor.

Mr. Steffen: Yes, it is dated December 1, 1933. I don't see the exhibit number 208 on my copy.

Mr. Bromley: It is on my copy.

Justice Stephens: It bears at the top the words: "Letter to—Copy to—E. L. Merriman—T. P. Eldred—Emil Hansen—H. W. Olmsted—728 Broad St., Utica, N. Y."?

Mr. Steffen: That is right.

By Mr. Steffen:

Q. Is Government's Exhibit 571, Mr. Hansen, the contract which you referred to just a moment ago, which was negotiated with the Kelley Plasterboard Company? A. Yes, sir.

Q. And you stated that you attended a preliminary con-

ference with Mr. Kelley concerning that matter, did you not? A. That is right.

Q. Can you tell us anything that took place at that conference with Mr. Kelley, at which there was a discussion of a possible threat to your loss of a source of supply?

Mr. Bromley: I object to that as repetitious and incompetent.

5179 Justice Stephens: Overruled.

The Witness: I don't recall any specific reference to loss of source of supply. It may have been in our minds, but I don't remember a specific mention of it.

By Mr. Steffen:

Q. Could you say that it was in your mind?

Mr. Bromley: I object to that as incompetent.

Mr. Steffen: We feel that it is highly material, your Honor, the attitude of the distributors concerning whether they were being coerced or not.

Justice Stephens: He has already testified that they felt insecure in their source of supply. It is repetitive. The objection is sustained.

By Mr. Steffen:

Q. That is true, is it not?

Justice Jackson: What is true?

Mr. Steffen: That you felt insecure in your source of supply.

Justice Stephens: That has been testified to.

The Witness: Yes.

Mr. Bromley: I move to strike out the answer.

Justice Stephens: It may go out as repetitive. It is quite unnecessary to have the same witness say the same thing twice.

By Mr. Steffen:

5180 Q. Now, Mr. Hansen, did you renew this contract at the end of the 5-year period? A. No.

Q. What change in your circumstances had occurred during that time, if any? A. The Oakfield Gypsum Products Corporation had ceased to exist.

Q. Was Kelley in the business any longer? A. No, he was out of business.

Q. And what became of the Oakfield Gypsum Products Corporation?

Mr. Bromley: I object to that as repetitious. We have had it testified a dozen times that it was sold to National.

By Mr. Steffen:

Q. What became of the plant of the Oakfield Gypsum Products Corporation? Is it still running—that is what I am getting at. A. No, it is not running.

Q. It was dismantled? A. Yes it was dismantled.

Mr. Steffen: We offer in evidence, your Honor, Government's Exhibits 568, 568-A, 569, 570, 570-A and 571, and we offer them with this statement, your Honor.

The witness was unable to remember some of the things appearing in these minutes of the Executive Com-
5181 mittee meetings as, for example, the threat to the board supply, and the reasons for the threat; but they appear in the documents of the Oakfield Gypsum Products Corporation, and they, coupled with the letter of Mr. Krumholz concerning commission men, coupled with the effort for the first time to get a long term 5-year contract with the Kelley Plasterboard Company, are all circumstances, as we see it, which tend to confirm Mr. Hansen's insecurity or feeling of insecurity, and therefore to establish what we charge in Paragraph 45(e) that the defendants concertedly induced and coerced the manufacturing distributors to maintain resale prices and to continue to conform to the practices or the sales terms of the defendant companies.

Justice Stephens: Is there any objection?

Mr. Bromley: I object to Exhibits 568, 568-A, 570 and 570-A, being minutes of the meetings of the Executive Committee of the Oakfield Gypsum Products Corporation, on the ground that they are incompetent because they are not declarations of a co-conspirator under the pleadings. It has already been held by your Honors that Oakfield is not charged as a co-conspirator, and therefore its minutes are not competent under any theory.

I object to Exhibit 569 for identification, being the Krumholz letter to Hansen of November 14, 1932, on the ground that it appears at page 5413 of this record
5182 that that letter had reference to Paragon of Syracuse and Paragon of Scranton, and it therefore is immaterial.

As to Exhibit 571 for identification, the Kelley-Oakfield contract of December 1, 1933, I make only the usual objection.

Justice Stephens: Well, Exhibit 571 is received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(Government's Exhibit No. 571 was received in evidence.)

Justice Stephens: Do you wish to be heard, Mr. Steffen, on the objections to Exhibits 568, 568-A, 570 and 570-A on the ground that they are mere declarations of the Oakfield Gypsum Products Corporation, and Oakfield, not being charged as a co-conspirator they can't be binding on anyone?

Mr. Steffen: Yes, I do, your Honor.

We are not offering them on the theory that they are declarations of a co-conspirator. We are offering them on the theory that they are documents, made in the usual course, the most formal documents that could be made, to show the state of mind and the attitude of the Oakfield Gypsum Products Corporation on the matters that are very important to determine coercion, or whether they were being induced to conform to a particular action.

These show, I think as clearly as could be, circumstantially, that the Oakfield Gypsum Products Corporation was feeling insecure as respects its source of supply of board; that there were apparently complaints made both as to commission men and as to the possibility of a loss of this source of supply of board—which appears particularly in Exhibit 570-A—

5183

Justice Stephens: (Interposing) First as to Exhibit 568—what, in Exhibit 568 for identification, shows anything concerning commission men, or jobber elimination, or insecurity with respect to source of supply?

Mr. Steffen: May I make the point that this is relevant only if you can show circumstantially that this, taken with other evidence which your Honors have heard in the case, as respects the attitude of the industry concerning commission men—we have discussed that already and introduced bulletins which show what the attitude was—taking that, together with all the other evidence that we have in the case you have a situation where the matter of commission men is being brought up before the Oakfield Gypsum Products Corporation in 1932. That, together with the reverse side, Exhibit 568-A, which has to do with the consideration by the Board of the Oakfield Gypsum Products Corporation at this time, as to whether they should or should not make a board plant, it seems to me is material.

Then following that, in Exhibit 570, with reference to the fact that Mr. MacLeish might be invited to look at their books, which would be an outrageous thing
5184 because Mr. MacLeish is counsel for the United States Gypsum Company; and following that with Exhibit 570-A, in which they say that following the Chicago meeting there was a threat of withdrawal of their source of supply—those things, added together, and viewed in the light of the other evidence in the case, it seems to me rather make out a case, circumstantially, that the attitude or state of mind of the Oakfield Gypsum Products Corporation at this time, was definitely insecure, in other words, that they were feeling the pressure.

I think the issue simply is as to what weight these are to be given. They are, I think, clearly admissible, so far as the rules of evidence are concerned.

Mr. Bromley: Since your Honor has asked a question with respect to the first exhibit offered, Exhibit 568 for identification, I think it should be stated that there obviously is nothing in it about insecurity.

So far as the second paragraph is concerned, the reference to commission salesmen, it was testified to by this witness at page 5415, that that discussion had to do with the Paragon companies and American Hardwall.

So that under no theory is there anything contained in Exhibit 568 for identification that has any materiality on any theory of this case.

Justice Stephens: What about Exhibit 568-A, the paragraph that has reference to data concerning a com-
5185 plete board plant? What do you say as to that, Mr. Bromley?

Mr. Bromley: I say that that is nothing but the declaration of Oakfield which is not competent, because Oakfield is not a co-conspirator, and that at any rate the whole subject matter of the attitude of the Oakfield Gypsum Products Corporation toward building a board plant has been fully testified to by this witness. He has given the reasons, and the period of time during which they felt as they did.

Mr. Steffen: A circumstance that comes up again very definitely in 1932, which as your Honors appreciate was the time when the most pressure was being put on the industry to conform to prices, is, as we see it, very material.

Justice Stephens: The problem is one not merely of materiality, but of competence. These are, on their face, hearsay statements; unless they are made in some manner

which brings them in as an exception to the hearsay rule, they are not competent.

They are not declarations of a co-conspirator, and they cannot come in on that theory as admissions, that is to say, as declarations of a co-conspirator, because Oakfield is not a co-conspirator and is not charged as such.

Now, the only other exception to the hearsay rule, to which you seem to relate them, is utterances offered not for their truth but to show the existence of an attitude of mind or a state of mind in the person who wrote
5186 them, Mr. Hansen, and his company.

I don't see anything on the face of Exhibit 568 which has anything to do with the item of insecurity. The reference there in the second paragraph to commission men, Mr. Hansen said related to Paragon and not to Oakfield.

What is the attitude of my colleagues?

(The Justices conferred.)

Justice Stephens: Exhibit 568 is excluded from evidence. Now, as to Exhibit 568-A.

(The Justices conferred.)

Justice Stephens: We wish to give the Government every opportunity to put in any circumstances which, taken together with other circumstances, may have any relevance to any of the issues, but there is no use of receiving into the record repeated proof of the same item.

Now, you have offered this witness, you have called him as a witness on whose truth and correctness you rely, and he has testified fully that there was insecurity concerning the source of supply, and that the company had considered building a board plant.

Exhibit 568-A is merely a repetition of that testimony, and we are all agreed that it ought to be excluded as purely repetitive. It proves nothing that you have not already proven.

Now, Exhibit 569, it was testified by this witness,
5187 related only to the two Paragon companies. This is your witness, and he described that exhibit as relating only to the Paragon companies.

Mr. Steffen: I think that is right.

Justice Stephens: So that is excluded on the ground that it is an item relating to a matter not within the issues.

Now, as to Exhibits 570 and 570-A—

Mr. Steffen: (Interposing) I might point out, your Honor, that the witness was unable to remember in detail either as to why Mr. MacLeish may have been referred to, or what was the threat at the Chicago meeting of the Gypsum Association because he did not attend. Therefore this offer is not repetitive.

Justice Stephens: Let us look at those exhibits again.

(Government's Exhibits 570 and 570-A were handed up to the Bench for the Court's examination.)

Justice Stephens: What theory of admissibility have you with respect to Exhibit 570? Obviously the only paragraph in that upon which you rely is the first main paragraph referring to the decision that Eldred would write to Mr. MacLeish offering to open the books. Now what does that prove or tend to prove, either alone or in connection with other evidence offered, or that you expect to offer—what does it tend to prove in respect of any issue in the case? That is what we have to keep 5188 in mind at all times in making these rulings.

Mr. Steffen: Well, I would say this, your Honor, that it is impossible, perhaps, to introduce only such paragraphs as say, "We feel insecure." You have to introduce this and read it in the light of the rest of the testimony in the case.

Justice Stephens: We are doing that, it is perfectly clear to us that you have a right to put in various items of evidence, which, though one alone might not constitute proof of anything, yet taken together do. But we have to be given some argument or assurance that each exhibit, when related to others, has some relevance to an issue here.

Now, what does this item, this paragraph concerning Eldred writing to MacLeish offering to open the books at any time—what do you expect to prove by that?

Mr. Steffen: I expect to prove—

Justice Stephens: (Interposing) In connection with other testimony.

Mr. Steffen: In connection with other testimony, yes, that there was a threat against the Oakfield Gypsum Products Corporation, and that they had felt that their position was so insecure that they were prepared to offer their books to MacLeish, who was counsel for the United States Gypsum Company, to let him see whether or not the affairs of the company were being handled satisfac-

torily from the point of view of the United States Gypsum Company.

5189 Justice Stephens: And you are going to call other witnesses to testify that there was a complaint made by the United States Gypsum Company against Oakfield?

Mr. Steffen: We don't know whether Mr. Eldred is going to be well enough to testify, or not. Mr. Eldred is the man who knew about that.

Justice Garrett: Well, it is a very far inference that you ask us to draw, or that you will ask us to draw I suppose, that this paragraph relates at all to any apprehension about supply of board.

Mr. Steffen: Or to terms of and conditions of sales which the Oakfield people were making. The obvious reason why Mr. MacLeish might be interested was that they might be making improper sales, sales at improper prices; and the testimony here has shown that you had a jobber situation in the industry at a time when they were trying to get rid of jobbers, "jobber" in the sense that Oakfield was selling to Paragon at a lower price and Paragon in turn was selling to dealers.

Justice Stephens: We will rule that on the present record, on the present showing, the exhibit is not admissible in evidence, but that ruling is without prejudice to your right to reoffer it if, in connection with other testimony which you produce, it appears then to have some relationship to some issue in the case.

5190 Mr. Steffen: That is Exhibit 570?

Justice Stephens: Yes.

Now, let's look at Exhibit 570-A.

Do you object to 570-A, Mr. Bromley?

Mr. Bromley: Yes, sir, on the same ground.

Justice Stephens: What do you say with respect to the statement there that Mr. Kelley had given assurance of "his cooperation in preventing any change from the present arrangement", and the reference with respect to the withdrawal of the "Board and Gypsum Lath Sales Arrangement"?

Mr. Bromley: I don't understand the legal theory on which the declaration of Oakfield, not a co-conspirator, can be offered in this case anyway. This, if it comes in at all, would come in under utterances forming a verbal part of an act. Now, what is the act that this utterance

forms a part of? How can you get it in under any exception to the hearsay rule?

Mr. Steffen: The Hillmon case—

Justice Stephens: (Interposing) What does it show, Mr. Steffen, with respect to someone's state of mind under the Hillmon case—whose state of mind and the state of mind with respect to what?

Mr. Steffen: The Oakfield Gypsum Products Corporation's state of mind, and I suppose also that of the three members of the Executive Committee.

5191 Justice Stephens: You mean with respect to insecurity?

Mr. Steffen: With respect to insecurity and with respect to what they should do about it, and with respect to the nature of the insecurity, that is, that it grew out of a threat apparently at a meeting of the Gypsum Association in Chicago, which relates it to these defendants.

Justice Stephens: That refers to the position of the Gypsum Association under the National Industrial Recovery Act—you are not relying on the National Industrial Recovery Act, Mr. Steffen, are you?

Mr. Steffen: No, your Honor. It is my understanding that the Gypsum Association was not just a NRA product.

Mr. Bromley: It seems to me to be so far fetched—

Justice Stephens: (Interposing) You need not reply further, Mr. Bromley. We think that if it proves anything at all it proves a state of insecurity on the part of Oakfield, and that has already been fully testified to and the exhibit is excluded as repetitive.

By Mr. Steffen:

Q. I would like to show you what has been marked as Government's Exhibit 403.

(Government's Exhibit No. 403 for identification was handed to the witness.)

By Mr. Steffen:

Q. I want you to look at the first page only, Mr.
5192 Hansen. Do you recognize that as Mr. Stromquist's signature? A. I am not a handwriting expert, but it looks to me like the signature that I was familiar with.

Mr. Steffen: We now offer in evidence, your Honor, Government's Exhibit 403. It has already been stipulated, I think, by Mr. Finck, that this letter was received by them, and the only question is as to who it was signed by.

Justice Stephens: Is there any objection to this, now that Mr. Stromquist's signature has been identified?

Is this being introduced in connection with this witness' testimony?

Mr. Steffen: Oh, no, your Honor. This is simply to cure the thing that I thought was preventing its admission.

Mr. Bromley: I would like to ask some questions of this witness about the signature, if I may, your Honor.

Justice Stephens: You may.

Mr. Bromley: How long has it been since you have seen Stromquist's signature?

The Witness: Three or four months.

Mr. Bromley: I show you Exhibit 559 for identification and ask you whether you can identify that as—

Mr. Steffen: (Interposing) I think, in order to make this fair, your Honor, we would like to have him see several of the signatures of Mr. Stromquist.

Justice Stephens: You may show them to him later. Let Mr. Bromley ask him on voir dire now.

5193

Mr. Steffen: Will you show him also Exhibits 560 and 561?

(Government's Exhibits 559 for identification, 560 for identification and 561 for identification were handed to the witness.)

Mr. Bromley: You will notice a considerable difference between the two signatures on Exhibits 559 and 560?

The Witness: Yes, sir.

Mr. Bromley: You will notice that there is a considerable difference between the signature on Exhibit 559 and the signature on Exhibit 403?

The Witness: There is a difference.

Mr. Bromley: Wouldn't you say that Stromquist's signature was as it appears on Exhibit 559 and not as it appears on Exhibit 403?

The Witness: I could not tell you; I am not a handwriting expert.

Mr. Steffen: Will you also look at Exhibits 560 and 561 to make a fair comparison?

Justice Stephens: We will have to do this alternately. Two lawyers cannot examine the same witness at the same time. Let Mr. Bromley finish, and then you will have your chance, Mr. Steffen.

Justice Garrett: Did I understand Mr. Steffen to

say yesterday that he had Mr. Stromquist under subpoena?

5194 Mr. Steffen: Yes, your Honor.

Justice Stephens: Is he in the room?

Mr. Steffen: Oh, no.

Justice Stephens: Then why take time over this if you can get him here—why can't he identify these signatures?

Justice Jackson: You said you were going to call him anyway.

Mr. Steffen: We were debating that, and I think we probably will.

Justice Stephens: If you are going to call him we might as well save all this time. He will know his own signature.

Mr. Steffen: Very well, your Honor. I would like to make this point, however, your Honor. We don't know whether Mr. Stromquist will be alive ten days from now, and this witness is a man who, I think, can—

Justice Stephens: (Interposing) Well, the probability that both Mr. Stromquist and this witness will not be alive ten days from now is remote. If you can't get Mr. Stromquist, then you can recall this witness if you must have this testimony, but this debate about a signature, which can be definitely established by Mr. Stromquist, takes much time which we really ought to save, Mr. Steffen, if we can.

Mr. Steffen: Very well.

Justice Stephens: So that exhibit is not received at the present time, but it may be reoffered when Mr.

5195 Stromquist is called on to identify his signature.

Mr. Steffen: We have no further questions, your Honor.

Justice Stephens: You may cross examine, Mr. Bromley.

Cross Examination

By Mr. Bromley:

Q. May it please th Court—Mr. Hansen, you have testified that Oakfield had no arrangements with the Universal Gypsum Company as to the prices which Oakfield should charge its dealer-customers on the resale of board purchased from Universal. Is it not likewise the fact that Oakfield had no arrangement, no agreement or understanding with the Kelley Plasterboard Company, or with any other supplier of board as to the prices which

Oakfield should charge its dealer-customers when it resold board purchased from the supplier? A. You ask—is it not likewise so?

Q. Yes. A. The answer is yes.

5196 And isn't it the fact that the Kelley Company continued to supply board to the Oakfield Company at all times subsequent to the date of the contract, December 1, 1933, which is Exhibit 571, right down to the time Oakfield went out of business?

Justice Stephens: Read the question. I am not sure you said what you wanted to, Mr. Bromley.

(The question was read by the reporter.)

Justice Stephens: I misunderstood you.

The Witness: The answer is yes.

By Mr. Bromley:

Q. And isn't it likewise the fact that no one ever complained about Oakfield's resale prices or practices in connection with the sale of board?

Mr. Steffen: That is a very broad question.

Justice Jackson: You mean at any time?

Mr. Bromley: At any time.

Justice Stephens: Well, if the witness knows, the breadth of the question can't be an objection.

The Witness: Not to me.

By Mr. Bromley:

Q. Isn't it the fact, likewise, that so far as you are concerned, you never heard, even, that there was such an organization as the Board Survey Company? A. Never heard? You mean right up to this date?

5197 Q. No, right up to 1938 when the Oakfield Gypsum Products Corporation went out of business. A. I couldn't fix the time when I first heard of the Board Survey organization, but I would say it was along in 1938.

Q. Whenever you heard of it, isn't it the fact that you never had any dealings with it, or any communications from it? A. That is correct.

Q. And isn't it the fact, likewise, that you never saw a license agreement between USG and anybody? A. That is right.

Q. You never attended any meeting of USG and its licensees at any time, did you? A. No, sir.

Q. And you never received any USG licensee bulletins, did you? A. No, sir.

Q. Did you ever have any knowledge that any conditions had been attached by USG, or anyone else, to USG's consent to your suppliers to sell you board at a discount? A. No.

Q. And it is the fact, isn't it, Mr. Hansen, that the Oakfield Company always bought board at a discount
5198 during the entire period of its existence? A. That is correct.

Q. Will you look at your testimony at page 5407, please?

(Copy of testimony handed to the witness.)

By Mr. Bromley:

Q. Do you see in line 9, that the Presiding Justice said: "Ask the witness what his prices were and what relationship, if any, they bore to Kelley's prices."

Do you see that? A. Yes.

Q. Now the fact is, isn't it, that the price which Kelley charged you, Oakfield, was the price which Kelley charged its dealers, less a discount? A. That is correct.

Q. So that, in order for you to know what the board was going to cost the Oakfield Company, which Oakfield bought from Kelley, you had to know what Kelley's dealer price was at all times, didn't you? A. That is correct.

Q. Because the board would cost you, Oakfield I mean, Kelley's dealer price less a 15 or 12-1/2 percent discount; isn't that right? A. That is right.

Q. So you wanted to know what Kelley's dealer
5199 price was, prior to the time that Oakfield sold to its customers, didn't you? A. That is correct.

Q. Because you wanted to know what your cost was before Oakfield sold its board to the customers; is that right? A. That is right.

Q. Now, you said that the cost of the board which Oakfield bought from Kelley, being Kelley's dealer price less a discount, gave the Oakfield Company a very small margin of profit, didn't you? A. Yes, sir.

Q. And when you said "profit", you meant gross profit? A. That is right, and I so testified.

Q. And beginning in line 19 on page 5407, where you said:

"We would have no way of knowing what margin of profit we were making unless we knew what the delivered price was in any particular market."

you meant that you had to know what Kelley's delivered

price was in order to determine what your cost would be, didn't you? A. That is correct.

Q. Now, you wanted to sell the board which you bought from Kelley, at as high a price as you could get, 5200 did you not? A. That is right.

Q. It was the fact, was it not, that Oakfield could not get, for the board, any higher price than Kelley was getting from the same class of customers? A. That is true.

Justice Stephens: We will take the noon recess at this time.

(Thereupon, at 12:15 o'clock p.m., a recess was taken until 1:45 o'clock p.m., of the same day.)

5201 AFTERNOON SESSION

(The trial was resumed at 1:45 o'clock p.m., pursuant to recess.)

Justice Stephens: You may proceed.

Thereupon, EMIL HANSEN, the witness on the stand at the time of recess, resumed his testimony as follows:

Cross Examination (resumed)

By Mr. Bromley:

Q. You testified, Mr. Hansen, that it was Oakfield's policy to sell board to dealers at the same prices as appeared on Kelley's price lists, didn't you? A. I think so.

Q. Now, the prices which appeared on Kelley's price lists were the prices which Kelley charged for board, to dealers? A. I would assume that that was so.

Q. And if Oakfield sold board at the same price that Kelley sold it to dealers, you would take a loss on that business, wouldn't you? A. The Oakfield Company?

Q. Yes. A. We would in the case of reshipment from Oakfield.

Q. And that was because your margin of profit 5202 was only 15 percent on board, gross profit? A. That is correct.

Q. And that was not enough to enable you to pay the cost of doing business, in the instances to which you have referred? A. That is correct.

Q. And isn't it so that the Oakfield Company could not get more for its board from its dealer-customers, than they could buy that same board for from Kelley? A. That is right.

Q. And it was the fact, wasn't it, that the Oakfield Company did not want to take any less for the board than it could get? A. Yes.

Q. So that resulted, as a matter of fact, generally, in the Oakfield Company being able to get for the board which it bought from Kelley, not any more than the price at which Kelley sold the board to dealers? A. That is right.

Q. And wasn't that all you meant when you said, on page 5409, that it was Oakfield's policy to sell at the same prices that appeared on the Kelley price lists? A. That is right.

Q. That policy was determined by Oakfield not as the result of any agreement, but as a matter of inde-
5203 pendent business judgment, wasn't it? A. That is correct.

Q. Mr. Spease has testified in this case, and he said in his testimony that he had a talk with you about the contract which was subsequently entered into between Oakfield and the Fairmont Wall Plaster Company. In his testimony, Mr. Spease said that you told him you, meaning Oakfield, could not divide the discount which Oakfield got, because if USG found out they would refuse to sell board to Oakfield.

Now, did you say that, or anything like that, to Spease? A. No, sir.

Q. It is the fact that Spease asked you if Oakfield wouldn't sell Fairmont, board at a discount, isn't it? A. I didn't quite get that?

Mr. Bromley: Will you read the question?

(The question was read by the reporter.)

The Witness: He did ask.

By Mr. Bromley:

Q. And you said no, you wouldn't? A. That is right.

Q. And you told him the reason you wouldn't, didn't you? A. Yes, sir.

Q. What was the reason? A. The reason was that
5204 there was no profit to us in the sale of board in that way, and as a matter of fact we would be taking some loss on it.

Q. And that was because the price that you had to pay Kelley for that board was the dealer's price less only 15 percent, wasn't it? A. That is correct.

Q. You told him, however, that you would give him a liberal discount on plaster, did you not? A. That is right.

Q. And in the written contract thereafter entered into, Exhibit 357, it was provided that Oakfield would sell Fairmont plaster at a discount, wasn't it? A. That is correct.

Mr. Bromley: May the witness be shown Exhibit 356?

(Exhibit No. 356 handed to the witness.)

By Mr. Bromley:

Q. Will you look at the first sentence of the last paragraph, please? A. Yes, sir.

Q. What did you mean by that sentence: "Due to the license agreement among the board manufacturers, we have no way of making the sale of this product profitable to you."? A. Well, under that agreement, a price had been fixed to us, or Kelley had been granted permission, as I understand it, to sell us board at a discount
5205 of 15 percent for the board, and 12-1/2 percent for the gypsum lath. Therefore, it was not profitable to us.

Q. But you did not mean to intimate to the Fairmont Wall Plaster Company, in that letter, that this license agreement you referred to was binding on you, or that you were a party to it, or had anything to do with it, other than as you have stated, did you? A. Other than that it was the fact that established the low price for us.

Q. Yes. That is to say, under the license agreement between USG and Kelley— A. (Interposing) I should say the "low discount".

Q. That is to say, under the license agreement between USG and Kelley, Kelley could not give you any more than a 15 percent discount off the dealer's price, could he? A. That is right.

Q. So that, again, all you meant to say was that since your gross profit was 15 percent, you could not resell the board to Fairmont and give him a discount? A. That is correct.

Q. With respect to Exhibit 357, the Oakfield-Fairmont contract, my recollection is that Mr. Spease, in his testimony, inferred, at least, that it was entered into to get around some prohibition by USG—is that the fact, Mr. Hansen?

5206 (Exhibit No. 357 handed to the witness.)

Mr. Steffen: I would object to that, Your Honor, if it is asking for what was in Mr. Spease's mind, or

what his testimony is about. If the question is directed to the contract, that is another matter.

Justice Stephens: The question is directed to the purpose of entering into the contract, and I think it is proper.

The Witness: May I have the question again?

Mr. Bromley: Will you read the question?

(The pending question was read by the reporter.)

The Witness: No.

By Mr. Bromley:

Q. Exhibit 357, the Fairmont contract, was not entered into as any device of any kind, was it?

Mr. Steffen: I think that that is asking for a conclusion and ought not to be permitted, Your Honor. The word "device" is ambiguous.

Justice Stephens: It seems to me, Mr. Steffen, it is the kind of a conclusion that any witness can be asked. After all, psychologically speaking, everything is an inference. Whether a thing is a trick or a device or a subterfuge is something that we all know about. I think that objection is not well taken.

The Witness: No, this was an ordinary contract to protect both the seller and the buyer.

5207 By Mr. Bromley:

Q. There was nothing secret about it? A. No, sir.

Q. And it didn't have any hidden meaning or any hidden purpose behind it, did it? A. No, sir, none whatsoever.

Q. You testified that the Oakfield Gypsum Products Corporation sold out to National in 1938. Wasn't the reason that you sold out because you got what you considered was an advantageous offer for the company from National? A. That was one of the reasons.

Q. Well, you didn't sell out because you had any difficulty, or rather, because Oakfield had any difficulty in buying board from any supplier, did you? A. Not difficulty in buying board, but difficulty in buying it so we could operate profitably.

Q. Because you still were not making money on board, is that right? A. That is correct.

Q. But you didn't sell out because anybody threatened to stop your supply of board, did you? A. No, sir.

Q. Now, you have testified that the Oakfield Company, although considering the matter, never did build a plant to

manufacture board. Oakfield's failure to build a
5208 plant was not because it could not get a license from USG, was it? A. I don't believe so. I think that that was discussed by Mr. Eldred, although I don't know. I have nothing but recollection on that score.

Q. Well, wasn't the reason that you didn't build a plant that the Executive Committee of Oakfield thought that it required too large an investment? A. That is correct.

Q. And wasn't that the only reason? A. Yes, that is right.

Q. And it is the fact, isn't it, that after Oakfield sold out to National, while the Oakfield Gypsum Products Corporation manufacturing plant was dismantled, it was moved by National to another location and has been in operation ever since? A. Well, I was told by Mr. Baker, and by Mr. Tarbell, who was the production man, that it was the intention to move the mechanical equipment to Savannah. I never saw it moved, and I haven't seen it in Savannah, and couldn't identify it there, but that was what they stated their purpose was, or one of their reasons, for buying the plant, to get the machinery immediately available for their Savannah plant. Whether it was moved or not, I do not know.

Q. The Oakfield Gypsum Products Corporation also sold its gypsum mines, didn't it, to National? A.
5209 Yes.

Q. Now, at the time of the sale, there was plenty of raw gypsum up there in the Oakfield Gypsum Products Corporation's mines, wasn't there? A. Yes.

Mr. Bromley: May the witness be shown page 5353 of his testimony?

(Copy of testimony handed to the witness.)

By Mr. Bromley:

Q. You understand, don't you, that the question beginning at line 2 on that page, which reads:

"Q. And in making sales by Oakfield, at what prices would the Oakfield Gypsum Products Corporation resell to dealers?"

was speaking about board purchased by Oakfield from Universal? A. That was my understanding.

Q. Now regardless of your answer as it stands there in the record, from line 4 to line 8, inclusive, isn't it the fact that a correct answer to that question would be:

"Oakfield would not resell Universal board to dealers, unless you called its three parents dealers"?

A. That is what I intended to say.

Q. Was it your understanding at all times, Mr. Hansen, while Oakfield was in existence, that if Oakfield wanted to build a board-manufacturing plant, it could get a
5210 license to manufacture and sell, from USG? A. Well, Mr. Eldred, who made those contacts for us, stated that he understood we could.

Mr. Bromley: That is all.

Justice Stephens: Is there any further cross examination by any other defendant?

(No response.)

Justice Stephens: Any redirect?

Redirect Examination

By Mr. Steffen:

Q. Did you have any understanding, yourself, Mr. Hansen, concerning whether USG would grant a license to the Oakfield people? A. I never had a contact with the USG, asking that question.

Q. And your only information is a statement that at some time Mr. Eldred made that statement? A. That is right.

Q. And did you know what he based that on? Did he say that he was sure, or did he say he thought, or what? A. Well, I would say that he based it on conferences he had with Mr. Henning.

Q. And there was an assumption that he could? A. That is right.

Mr. Steffen: I move to strike that answer, Your
5211 Honor, on the ground that it is based purely upon hearsay statements.

Justice Jackson: You ask to have this answer stricken?

Mr. Steffen: I ask to have the answer to Mr. Bromley's last question stricken, in which the witness stated that he thought Mr. Eldred had said something.

Justice Stephens: Do you resist the motion?

Mr. Bromley: Yes, I do. It seems to me his state of mind, in connection with his testimony about the fact that the company never built a plant, makes—

Justice Jackson: (Interposing) That is not the answer that Mr. Steffen wants stricken.

Justice Stephens: I see your point. In other words, you say that regardless of the truth of Mr. Eldred's statements,

or accuracy of Mr. Eldred's statements, concerning the possibility of ta ing a license from USG, if this witness had information to that effect it was a circumstance which might have a bearing upon his state of mind as to the necessity of building a plant? Is that your point?

Mr. Bromley: As to why he didn't.

Justice Stephens: As to why he did not build a plant?

Mr. Bromley: Yes.

(The Justices conferred.)

Justice Stephens: My two colleagues think it ought to be stricken as pure hearsay. I should be inclined, myself, to think, Mr. Bromley, that it could stay in, provided
5212 it was shown that the same information was brought to the attention of the other members of the Executive Committee so that it would influence them. I should think it might be a material circumstance bearing upon this man's state of mind, but I defer to the views of my colleagues, and it is stricken.

Mr. Bromley: I would merely like to state, for the benefit of the entire Court, that the testimony now is that this information was in the possession of the majority of the Executive Committee of Oakfield Gypsum Products, because there were only three on the Committee, and Mr. Eldred and Mr. Hansen had that understanding.

Justice Stephens: Who was the third member?

Mr. Bromley: Mr. Merriman.

Justice Stephens: Was that statement by Mr. Eldred brought to the attention of the other two of you?

The Witness: It was, sir.

Mr. Steffen: Do you remember about when that was, Mr. Hansen?

The Witness: I would say sometime between 1932 and 1935, when we were giving the most serious consideration to building the plant.

Justice Stephens: In view of that, do you move to strike it?

Mr. Steffen: I think it would be immaterial one way or the other, Your Honor.

5213 Justice Stephens: Then we will let it stand.

By Mr. Steffen:

Q. I want to call your attention again to your testimony on page 5353.

(Copy of testimony handed to the witness.)

By Mr. Steffen:

Q. I think you corrected your testimony again on that, and I should like to have your statement as made to Mr. Bromley, in his last question upon that point.

(The record was read by the reporter as follows:

"Q. Now regardless of your answer as it stands there in the record, from line 4 to line 8, inclusive, isn't it the fact that a correct answer to that question would be:

"'Oakfield would not resell Universal board to dealers, unless you called its three parents dealers'?

"A. That is what I intended to say.")

By Mr. Steffen:

Q. Do you regard that, Mr. Hansen, as a different answer than appears in the record as it stands? A. It was the intent that I had when I said this: "Would resell to dealers"—I meant that as repeating the question, sir, and it does not make sense—

Justice Stephens: (Interposing) Well, it doesn't make sense unless you read it as a question; and unless, also, you add the word "no".

5214

The Witness: That is right.

Justice Stephens: That is to say—

The Witness: (Interposing) "Would resell to dealers?—no, unless you call", and so forth. That is what I meant to answer, and it is the fact.

By Mr. Steffen:

Q. As I understand it, the fact is that Oakfield, at this time, was not selling to dealers except as it might be selling to the three parent companies? A. That is right.

Q. Now, in regard to your property there at Oakfield, when you sold to National the machinery was dismantled, you assume? A. That is right.

Q. And has the mine been operated? A. I believe not.

Q. Now, in regard to your selling to the National Gypsum Company, I think you stated that one of your reasons was that the Oakfield Gypsum Products Corporation business was unprofitable, is that true? A. It was becoming unprofitable.

Q. And will you state why it was becoming unprofitable, in more detail? A. Yes, sir. There were two definite reasons,—a more limited market for neat plaster, which was our principal product of manufacture;

5215

and the inability to secure gypsum board and gypsum lath, which it was necessary to market with gypsum plaster, at a discount sufficient to make that business profitable to us.

Q. Did that apply particularly on mixed cars? A. That is right.

Q. And will you explain why that would be true? A. Because of the necessity of taking the gypsum board and lath into the warehouse at Oakfield, rehandling it, and shipping it out, plus the selling expense.

Q. Was there a change in your business, looking to a larger number of mixed car shipments? A. That would be difficult for me to answer, sir.

Q. Well, your business was more unprofitable in 1938 than it had been back in 1930; is that correct? A. That is right.

Q. And can you attribute that to any change in conditions? A. Because we were selling very much more neat plaster in 1930, 1931 and 1932, than we were in 1936 and 1937.

Q. And you were selling more board in 1936 and 1937? A. We were selling more board in 1936 and 1937.

Q. Proportionately? A. That is correct.

5216 Q. And inasmuch as you were losing more money on your board, and you were selling more board, your business was less profitable; is that right? A. That is right.

Q. Now, in regard to this contract between your company and Fairmont, Exhibit No. 357, it is true that you gave what you said was a liberal discount to Mr. Spease? A. I think so.

Q. By "liberal", do you mean that it was unusually large, or what? A. No, it was a good, fair margin.

Q. And you didn't feel free to make him any concession on your board price?

Mr. Bromley: I object to "didn't feel free". I think that that is incompetent and calls for a conclusion.

Justice Stephens: If that is intended as a characterization of the witness' testimony, I think it is not correct, Mr. Steffen. He didn't say that.

Mr. Steffen: I didn't so intend it.

Justice Stephens: You may bring out what he meant by it, if you wish to, on redirect—if there is any doubt about it.

Mr. Steffen: I think that is all, Your Honor.

Mr. Bromley: I have one matter before this witness is excused. I should like to have an understanding that

5217 the Government will recall him for cross examination

if, after he leaves the jurisdiction, they decide to offer in evidence Exhibits 565, 566 and 567 for Identification.

Justice Stephens: Were those offers excluded with a reserved right to re-offer on some condition?

Mr. Bromley: No, those were never offered at all. Those were Kelley-Hansen letters.

Justice Stephens: That is right.

Mr. Steffen: I would like now to offer those three letters, Your Honor.

Mr. Bromley: And I object to each one of them as immaterial, because this witness has testified, at page 5399, that they all applied to the Paragon Plaster Company.

Justice Stephens: What page?

Mr. Bromley: Page 5399.

Justice Stephens: You mean commencing at line 15?

Mr. Bromley: Yes, sir.

Justice Stephens: That is as to Exhibit 565.

Mr. Steffen: Exhibits 566 and 567 are related.

Justice Stephens: That is right.

Mr. Steffen: Our contention would be that they were addressed to Emil Hansen at 300 West Water Street; that those were also the offices of the Oakfield Gypsum Products Corporation that these were price bulletins furnished by Kelley which may have had to do, as testified on page
5218 5397, with sales by Paragon, but that they were also sales by Oakfield in the sense that Oakfield would sell to Paragon, and Paragon would sell to the dealer.

Justice Stephens: Since the Government's own witness testified that the exhibits related only to Paragon, and testified at the time that he was being examined with the distinction between Paragon and Oakfield in mind, we think the objection is well taken.

Moreover, the exhibits are almost meaningless, on their face, because they are not complete. At least, Exhibit 565 is lacking a bulletin, and 567 refers to 565, apparently, which lacked a bulletin. The two letters are not explanatory on their face. But apart from that, we think the witness himself has testified that they are related only to Paragon, and therefore, under the ruling of the Court with respect to Paragon not being charged with resale price fixing under the pleadings, those exhibits are excluded.

Mr. Bromley: No questions.

Justice Stephens: Mr. Hansen, you are excused, and we thank you for coming here to help the Court.

The Witness: Thank you.

(Witness excused.)

Mr. Knuff: Shall I proceed with the next witness?

Justice Stephens: Yes, do.

Mr. Knuff: Ezra Sensibar, please!

5219 Thereupon, EZRA SENSIBAR, called as a witness for and on behalf of the United States, having been first duly sworn, was examined and testified as follows:

Justice Stephens: Have you been a witness before, Mr. Sensibar?

The Witness: Not in this hearing.

Justice Stephens: I don't mean in this case, but in any court.

The Witness: Yes, I have.

Justice Stephens: You are probably familiar with the duties of a witness. Since a case has to be tried according to the issues raised by the complaint and answer, the lawyers are expected to ask questions which are related to those issues, and you should confine your answers, so far as you accurately can, strictly to the questions asked. Don't volunteer any answers, unless it is necessary to make a truthful and accurate answer. If you see adverse counsel rise to make an objection, don't answer until the Court has ruled upon the objection.

The Witness: I will do my best.

Justice Stephens: If you can't answer a question "Yes" or "No", of course, you are not required to. You may feel at ease and free about testifying truthfully and accurately.

5220 The Witness: Thank you.

Direct Examination

By Mr. Knuff:

Q. Your name is Ezra Sensibar, is that correct? A. Yes, sir.

Q. At present you are a resident of Mexico City? A. Yes, sir, I am.

Q. And how long have you been in Mexico City, Mr. Sensibar? A. As a resident, since June, 1942.

Q. Were you formerly connected with the Cardiff Gypsum Company? A. Yes, sir, and I still am.

Q. You still are connected with the Cardiff Gypsum Company? A. Yes, sir.

Q. When did you first become employed by the Cardiff Gypsum Company? A. Along about 1930 or 1931.

Q. In what capacity, at that time? A. As Vice President.

Q. And what is your present capacity with the Cardiff Gypsum Company? A. I am President of the company.

Q. And have been President of the company for
5221 how long? A. Since the summer or fall of 1935.

Q. The Cardiff Gypsum Company's plant is located, if I understand correctly, at Fort Dodge, Iowa, is that correct? A. That is correct, just outside of the city.

Q. Will you explain to the Court the various items that the Cardiff Gypsum Company manufactures? A. The principal product is wall plaster, such as would be used in a room like this. There are a number of other products, in a general way somewhat similar, that are used for special purposes, such as finishing walls; and another product that is called manufacturer's stucco, which is casting material, something used to cast statuary, for example, and other objects.

Q. Do you manufacture any gypsum block? A. No, sir, we do not.

Q. Where are your products sold, Mr. Sensibar—and by "your", I mean the products of the Cardiff Gypsum Company? A. Generally speaking, in the territory bounded on the west by the Rocky Mountains; on the east by Indiana; and on the north by the Canadian line; and toward the south by Texas and the Gulf States.

Q. The products that you manufacture at Fort Dodge are sold throughout that area, is that correct? A. That is right.

5222 Who are the other officers of the Cardiff Gypsum Company, at present? A. Mr. Maurice J. Breen, of Fort Dodge—

Q. (Interposing) Is that "Green" or "Breen"? A. Breen. He is Vice President of the company. Mr. Ira J. MacConnell.

Q. The two men that you have mentioned, in addition to yourself, are the officers of the Cardiff Gypsum Company; is that correct? A. That is right.

Q. Around about 1934 or the beginning of— A. (Interposing) Pardon me. To be perfectly accurate, I should say that Mr. MacConnell resigned some time ago, and has not been replaced.

Q. So that, with that correction, then, Mr. MacConnell was formerly an officer, but recently has resigned? A. That is right.

Q. In 1930, did your company attempt to purchase gypsum board and gypsum lath from any other company?

Mr. Bromley: Just a moment. I object to that as immaterial to any charge in the complaint, the charge, as I understand it, being that the manufacturing distributors named in the bill of particulars were coerced into reselling gypsum board at bulletin prices. There is no charge in the complaint having to do with the inability of
5223 Cardiff Gypsum Company to get gypsum board.

Justice Stephens: Is Cardiff named in the bill of particulars as a manufacturing distributor?

Mr. Bromley: No, sir.

Mr. Knuff: If Your Honor pleases, Cardiff couldn't be named as a manufacturing distributor for the reason that they were never able to purchase board. They couldn't have been named as a manufacturing distributor.

Justice Stephens: Well, I am not saying that you were obliged to. I was just trying to find out what the fact was, and trying to see what the theory of the evidence was, under the pleadings.

What do you intend to prove by this witness, and to what charge in the complaint is it related?

Mr. Knuff: I intend to prove by this witness two principal things: first, that the defendants have conspired to control plaster prices; and, second, that the defendants have conspired to eliminate from the distributive system wholesale distributors who might fail to maintain prices.

Justice Stephens: Read that statement, will you?

(The record was read by the reporter.)

Mr. Knuff: Now, apropos of the first, that is covered by Paragraph 45(c) of the complaint, which appears on page 10; and as to the second, it is covered by Paragraph 121 of the complaint, which appears on page 31 of the complaint.

5224 Justice Stephens: Well, won't you briefly outline, so that the Court can get the theory of relevancy and materiality, how you intend to relate Cardiff to that charge?

Mr. Knuff: Yes, I will outline that briefly.

Justice Stephens: We can't foresee what the proposed testimony is.

Mr. Knuff: Shall I proceed?

Justice Stephens: Yes; just make a very brief statement, you don't need to argue the point.

Mr. Knuff: Beginning early in the 1930's—the exact year the witness will tell us—the Cardiff Gypsum Company endeavored to purchase board from the American Gypsum Company, from United States Gypsum Company, from Certain-teed, from Universal, from National, and from Texas; that endeavor to purchase extended from 1933 down to around 1938 or 1939; that when he went to see the American Gypsum Company to get board from the American, he was told by Mr. Arthur Black of the American Gypsum Company that in view of the fact that the Cardiff Gypsum Company had a reputation on the market as a price-cutter on plaster, he didn't know what could be done for him. However—

Justice Stephens: (Interposing) I think you have stated enough to indicate the general theory of the testimony.

Now, what is your objection to that, Mr. Bromley? If the Government can prove that this company was
5225 eliminated or refused products, isn't that material under the general charges here which have been sustained by the majority of the Court?

Mr. Bromley: I didn't think it was, and there is no charge in the complaint that has to do with this, that I can see anywhere.

The reason it has always seemed so clear to me is that this was one part of the criminal indictment, specifically charged there, which was omitted from the bill in equity, completely omitted. It was very definitely charged in the indictment, but when we come to the bill of complaint that allegation is completely omitted.

Justice Stephens: Paragraph 121 charges complete elimination from the distributive system of wholesale distributors who might fail to maintain prices.

What is the other paragraph that you rely on?

Mr. Knuff: Were you addressing me, Your Honor?

Justice Stephens: Yes.

Mr. Knuff: Paragraph 45(c), Your Honor, at page 10.

Justice Stephens: The objection is overruled.

By Mr. Knuff:

Q. Suppose we start over again with the question. Beginning sometime in 1930, Mr. Sensibar, did the Car-

diff Gypsum Company attempt to purchase board and lath from a board and lath manufacturer?

5226 Mr. Bromley: May I have a general objection to all questions having to do with board?

Justice Stephens: With board?

Mr. Bromley: Yes, with board. As I understand, he has two objectives in view,—one is plaster, and the other is board. May I have a general objection to all questions having to do with board?

Justice Jackson: And "board", of course, includes gypsum lath?

Mr. Bromley: Yes, sir.

Justice Stephens: Paragraph 121 relates to board, plaster, and miscellaneous gypsum products. What is the basis of your differentiation in your objection?

Mr. Bromley: I didn't mean to make any at all, I want to object to both types; but I thought he was only now inquiring about board, and when he came to plaster I thought the ground of my objection would be somewhat different.

Justice Stephens: Are you going to examine first on board, and then on plaster?

Mr. Knuff: No, Your Honor. The reasons that they gave for the refusal to sell them board will, in and of themselves, sustain the position that the Government takes that they were trying to maintain plaster prices.

Mr. Bromley: Then may I have a general objection to all the testimony of this witness, as immaterial?

5227 Justice Stephens: You may. The record will show your general objection that this is immaterial, and that it is overruled.

Justice Garrett: When did the witness state that he became connected with the Cardiff Gypsum Company?

By Mr. Knuff:

Q. Will you answer that, please? A. I became active in the affairs of the company in 1930 or 1931.

Q. Do you remember the question—

Justice Stephens: (Interposing) Let me ask one other question.

This case is so complicated that I don't pretend to remember every detail of it all at once and without notice. Was this subject gone into in the reserved rulings?

Mr. Knuff: Not that I remember, Your Honor.

Mr. Bromley: It was gone into in connection with Mr. Lenci's testimony, as I remember it.

Justice Stephens: Well, we are anxious to have our rulings consistent.

Mr. Bromley: Well, this ruling is consistent with that. I think Mr. Lenci was interrogated, over my objection, as to his dealings with Cardiff, and his attempt to get a consent from USG to sell Cardiff. I think I objected, and I think the Court ruled that that was material,
5228 and it was admitted, Judge Garrett dissenting.

Justice Stephens: Thank you, Mr. Bromley.

By Mr. Knuff:

Q. Do you remember the question? A. No.

Q. Then I will rephrase it. A. All right, sir.

Q. So we understand one another, Mr. Sensibar, when I use the term "board", I want you to understand that I mean by that term wallboard as well as plasterboard and plaster lath. I am going to use "board" as a general term comprehending both board and lath. A. All right, sir.

Mr. Bromley: I am now told that I was mistaken, that there was some limitation in the ruling of the Court.

Justice Stephens: Well, I would like to have the Court's recollection refreshed, if possible. We want to be consistent, not just to be consistent, but because we try to make each ruling correct, and if our ruling on the objections with respect to Lenci's testimony on this subject was carefully made—as we try to make each of our rulings—we ought to have it in mind in making this one, if it presents the same subject.

Can you refresh our recollection as to the part of the record in which that was discussed?

5229 Mr. Bromley: If I may have a moment, Your Honor; I think that I can find it.

Justice Stephens: Yes, take your time.

We will take the afternoon recess at this time, and perhaps counsel, during the recess, can look up that reference. Perhaps Government counsel can assist on that.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

5230 Justice Stephens: Proceed.

Mr. Bromley: This question came up, may it please the Court, during the testimony of the witness Lenci, in connection with Exhibits 523 and following. It was there shown that the Cardiff Gypsum Company had

negotiations with the Ebsary Gypsum Company about the purchase of board, and that the Ebsary Gypsum Company applied to USG for USG's consent to Ebsary to sell Cardiff, which consent was refused.

In connection with the proffer of that testimony the Court ruled, in an advisory fashion, on page 4542, saying:

"Justice Stephens: There is nothing before the Court to rule on, but for the guidance of counsel we may say that if these letters, Exhibits 523 to 527, inclusive, are to be offered on the theory that the Government states—which I need not repeat because it is clearly stated on the record—that all of us are agreed, all of the Judges, that they are not admissible under paragraph 45 (e).

"Judge Jackson and I are of the view that they are admissible under paragraph 45 (c), where it is charged that the defendants concertedly raised, maintained and stabilized the general level of prices for plaster and miscellaneous gypsum products.

"We think the proffered evidence may possibly support an inference that the defendants were trying to keep their own prices on plaster up, by keeping the prices of
5231 other people up, although it seems to Judge Jackson and myself that it might support a different inference, that it was a kind of indirect rebating or gift enterprise.

"Judge Garrett is doubtful, I think, whether the evidence is admissible on any theory. In fact, I think it is his view that it is not admissible under any theory of the complaint."

Now, at page 4554—

Justice Stephens: (Interposing) If I may interject, I remember now that was the testimony that had to do, was it not, with Mr. Lenci's letter to USG asking for a consent to sell to Cardiff?

Mr. Bromley: Yes, sir.

Justice Stephens: And his failure to get an affirmative response?

Mr. Bromley: Yes, sir.

At page 4554, the following appears:

"Justice Stephens: Now whether or not you named Cardiff as a manufacturing distributor, how could the evidence which you offered, which is evidence that the defendants refused to sell board to Cardiff, prove that they fixed its price?"

And again at page 4556 the Presiding Justice said:

"I don't yet understand how evidence that the defendants refused to sell board to Cardiff could tend to prove that they were fixing the price of other manufacturing distributors on board, since this company was only a plaster price-cutter."

5232 Finally, at page 4582 there was the general ruling, beginning at line 5:

"Justice Stephens: I am referring to the ruling in which Judge Jackson and myself indicated that this class of evidence was admissible under paragraph 45 (c) of the complaint, but not under 45 (e), to which Judge Garrett dissented, thinking it inadmissible at all. That is clear now, I think."

Justice Jackson: Did we make any reference at all to paragraph 121, Mr. Bromley?

Mr. Bromley: Yes, sir.

At page 4540, beginning in line 21, I said:

"Paragraph 121 is under the effect of the combination. It is not a charge of the combination or its scope. The last sentence to which counsel refers, or the last part of the last sentence, "have completely eliminated from the distributive system wholesale distributors who might fail to maintain said prices", I think plainly refers to jobbers, I think a reading of the whole complaint shows that reference is to the allegations in paragraph 94 that we conspired to sell only to jobbers who sold to dealers, who maintained bulletin prices.

"I did not before understand that the use of the words "wholesale distributors" was ever intended to broaden the scope of the allegations of the conspiracy, and I think all of us have understood that to mean merely jobbers."

5233 Then the record shows the following:

"Justice Stephens: Do you wish to be heard, Mr. Knuff?

"Mr. Knuff: No, your Honor, I think not.

"Justice Stephens: Of course there is no offer before the Court, but the Government states that exhibit numbers—

"Mr. Knuff: (Interposing) Beginning with Exhibit 523 and going to 527, so far.

"Justice Stephens: (Continuing) Exhibits 523, 524, 525, 526, and 527 are to be offered—do you offer them at this time?"

So I thought it was accepted that paragraph 121 did not cover, and the final ruling of the Court was that the Lenci evidence was only admissible under 45 (c), having to do with plaster prices.

Justice Stephens: Judge Jackson and I will rule as we did before, that the evidence is admissible for what it may be worth, subject to the same doubts that we expressed previously as to its value, under paragraph 45 (c).

Judge Garrett will make a separate statement.

Justice Garrett: I suppose that from the standpoint of personal consistency I should again dissent. But the situation is somewhat different from what it was when I dissented before. It has been my uniform practice, after a majority of my associates—when I was sitting with associates—would pass upon a question, to acquiesce in
5234 that holding and treat it as the settled rule or law of the case. Hence, I do not persist in any dissent in this instance.

Justice Stephens: In other words, you feel bound by the ruling when it has once been made?

Justice Garrett: Yes.

Justice Stephens: I think we all take that position.

You may proceed, Mr. Knuff.

Mr. Bromley: May I have the record show that I have a continuing objection to all of this witness' testimony?

Justice Stephens: The record may so show, and it is overruled.

By Mr. Knuff:

Q. In the early part of 1930, did your company make an effort to purchase board from any other manufacturer? A. I don't know of any such attempts.

Q. Maybe I didn't make myself clear—I meant to say in the early 1930's? A. Oh, I beg your pardon. Yes, beginning with the summer of 1933.

Mr. Knuff: Mr. Sensibar, will you kindly speak a little louder so that Mr. Johnston may be able to hear.

Mr. Johnston: If the Court please, I don't want the record to insinuate that I am the only old man here. I think that a good many others are having trouble hearing.

Justice Stephens: Yes, I was having trouble,
5235 Mr. Johnston, I will share the trouble with you. (Laughter)

Mr. Knuff: I was just beginning to wonder if I was getting away with that "shot from ambush", but I see I wasn't successful. (Laughter)

By Mr. Knuff:

Q. From what company did the Cardiff Gypsum Company endeavor to purchase board? A. I believe that the first people with whom we discussed the question was the Universal Gypsum Company.

Q. Who conducted those negotiations? A. I did.

Q. And whom in Universal did you contact? A. Mr. Eugene Holland.

Q. And where did you contact Mr. Holland? A. In Chicago, in the Edgewater Beach Hotel, where we were holding meetings all that summer with respect to establishing a code under the NRA and—

Justice Stephens: (Interposing) Now, Mr. Sensibar, just in the interests of saving time, let this question illustrate the purpose of my little injunction to you at the time we started out.

Read this question to the witness.

(The question was read by the reporter.)

Justice Stephens: The answer to that question should be "the Edgewater Beach Hotel in Chicago." But you proceeded to go on and state how you happened to be there, what the purpose of the meeting was, and that you had been there all summer. You weren't asked that. You were simply asked where you met. Please answer questions directly. If counsel want to bring out those other matters, they will do that.

5236

The Witness: Yes, sir.

By Mr. Knuff:

Q. Can you fix the time a little bit more definitely than the summer of 1933; can you give us the month? A. I would say it began in June.

Q. And did you have one meeting or more than one meeting with Mr. Holland? A. I had a number of them.

Q. And by a "number", what do you mean? A. Perhaps six or eight.

Q. What did you ask Mr. Holland? A. I asked him whether we might not make arrangements so that Cardiff would be sold board on the customary industry basis.

Q. And what was the customary industry basis?

Mr. Bromley: May this testimony having to do with what Mr. Holland said be received subject to the usual reservation?

Justice Stephens: Yes. I think it should be received subject to the usual reservation. It is a declaration of Holland.

5237 Mr. Bromley: May that be understood also as to the future testimony?

Justice Stephens: It may be, and the record may so show.

Mr. Knuff: What was my question?

(The question was read by the reporter as follows:)

"And what was the customary industry basis?"

By Mr. Knuff:

Q. By "customary industry basis" what do you mean? A. I mean a discount of 15 percent on long board and 12-1/2 percent on lath.

Q. What did Mr. Holland say to you, if anything? A. He told me that that would be a matter for the final decision of USG, and that he thought that if they would be willing for us to have the board and lath at all, they would be willing to sell it directly; that since they had a plant at Fort Dodge, that perhaps I might take it up with them directly.

Q. And did Mr. Holland ever state to you that he would endeavor to secure permission from USG to sell your company board? A. Yes. I persisted with him, pointing out that he perhaps was in a better position to get that consent from USG than we were directly.

Q. And did he later tell you whether or not he was
5238 able to get the consent? A. He told me that he had discussed it with them a number of times, and that they had refused it.

Q. Did he tell you why they had refused it? A. He told me that there was a general impression in the industry that Cardiff had been cutting prices on gypsum plaster; that he doubted, under those circumstances, whether we could make a connection to get board.

Q. And were you able to secure board from Universal? A. No, sir.

Q. Now, is that the substance of all the conversation that you had with Mr. Holland? A. Perhaps not. I asked him as a matter of advice what, in his opinion, he thought we

might do. I explained to him the situation of the Cardiff Company, that the control had changed hands, and that I understood the objections of the industry to the policies of the company under the management that had existed up to that time; but I explained that a change had taken place, and in view of that I asked him what he would advise us to do, as newcomers entering into the control of the company.

Mr. Bromley: What was the date of this, please?

Mr. Knuff: What was the date of the conversation that you are now relating, that you had with Mr. Holland?

The Witness: The summer of 1933.

By Mr. Knuff:

5239 Q. Now when you say that you stated to him that the control had changed hands, will you tell us just what you mean by that? I am not sure that I know. A. The Cardiff Gypsum Company had been founded by and the control at that time, the stock control, was in the hands of the Breen family, in Fort Dodge, Iowa, and sometime before that my brother and I had acquired from various interests in Fort Dodge, a controlling percentage of the stock of the company.

Q. And when you say that the control had changed hands, you mean by that that the Breen family was no longer in control of the policies of the Cardiff Gypsum Company, is that correct? A. Well, not quite. Mr. Tom Breen was at that time the president and the manager of the company, but neither he nor his family any longer had a controlling stock interest, and I explained to Mr. Holland at that time that it was our intention to take an active interest in the management of the business, and that he might therefore expect that the policies of the company would change.

Q. What did Mr. Holland say to that? A. He welcomed it and said that he thought that after some short time, after some showing actually of a different policy with respect to sales, that the attitude toward the company might change; and he advised me that in the meantime our
5240 best bet was to take up the matter with the American Gypsum Company.

Q. Now is that the substance of the various conversations that you had with Mr. Holland? Have you given us

the substance of all the conversations? A. Yes, sir, as far as I can remember it.

Q. In 1933 did you contact anyone at USG in an attempt to purchase board from USG? A. Only by way of casual conversation with Mr. Henning.

Q. Was this before your contact with Mr. Holland or after your contact with Mr. Holland, or while you were negotiating with Mr. Holland? A. Yes, it was during that same period.

Q. And while the negotiations were on between you and Mr. Holland? A. That is right.

Q. What did you say to Mr. Henning, if anything? A. I believe I said to him one day, in the company of Mr. Bale—

Q. (Interposing) Mister who? A. James Bale—I believe I explained to him the changed status with respect to the stock ownership of Cardiff, and our plans with respect to entering into the active management of Cardiff, and expressed again the hope that the company would be treated a little differently than they had been in the past.

5241 Q. At that time did you endeavor to buy any board from USG?

Mr. Bromley: I object to that as incompetent, because calling for a conclusion. Let him ask what he said.

Justice Stephens: Sustained. Ask the witness what he said, and what Mr. Henning said.

Mr. Knuff: I don't understand Mr. Bromley's objection. I am asking if he endeavored to buy board from USG.

Justice Stephens: Well, whether he endeavored to buy it or not is a form of conclusion which the Court might draw if we hear what he said to Mr. Henning. Ask for the conversation with Mr. Henning on the subject of the possible purchase of board.

Mr. Knuff: All right, sir.

By Mr. Knuff:

Q. With reference to the purchase of board, did you have any conversation with Mr. Henning? A. I believe I discussed with him the difficulties that Tom Breen had told me of, in that the company had tried for some time to get board and had been persistently refused that privilege, and I went over the same ground with him that I just re-

lated as to the new attitude and policy of the company, and our hope that conditions would change.

Q. What, if anything, did Mr. Henning say to you? A. He gave me encouragement in that respect.

5242 Mr. Bromley: I move to strike the answer out as a conclusion.

Mr. Knuff: I think that the answer probably should go out as a conclusion.

By Mr. Knuff:

Q. Can you tell us what Mr. Henning said to you?

Justice Stephens: Let me explain to you, Mr. Sensibar, so you won't be confused. You are not expected to recollect the exact words, unless you happen to, but you can give the substance and effect of what Mr. Henning said, rather than characterizing it as an "encouragement" or a "discouragement". We can tell whether it was encouraging or discouraging after we hear what he said in substance and effect.

The Witness: All right, sir.

Mr. Henning confirmed the fact that it was the impression around his organization that Cardiff had been a price-cutter in the plaster field, and that this was not a very propitious time to talk about such a matter as I wanted to discuss; but that after a little experience with the new policy of Cardiff, the situation might be better.

By Mr. Knuff:

Q. Now, coming back to the Universal Gypsum Company, did you buy, or were you able to buy board from Universal? A. No, sir.

Q. Were you able to buy board from USG in 1933?

5243 A. No, sir.

Q. Throughout my questions, Mr. Sensibar, I want you to understand that when I say, "Were you able to buy board?", I mean by that were you able to buy board at a discount. You will understand that, will you? A. Yes, sir, I understand that.

Q. And have these questions which you have answered been answered on that basis? A. Yes, they have.

Q. Did you contact any other companies in 1933 with reference to the purchase of board at a discount? A. I think in the fall of that year that I began to talk to the American Gypsum Company of Port Clinton, Ohio.

Q. With whom in the American Gypsum Company did you negotiate? A. With Arthur Black.

Q. I show you what have been marked for identification as Government Exhibits 572, 573, 574, and 575.

(The documents referred to were marked as Government Exhibit Nos. 572, 573, 574 and 575, for identification.)

(Government Exhibits Nos. 572, 573, 574 and 575 were handed to the witness.)

Mr. Knuff: Exhibit 572 is a copy of a telegram, dated 8-25-33, addressed to the American Gypsum Com-
5244 pany and signed—Ezra Sensibar.

Exhibit 573 for identification is a telegram dated August 25, 1933, addressed to Mr. Ezra Sensibar, and signed—American Gypsum Company.

Government's Exhibit 574 for identification is the original of a letter, dated September 21, 1933, addressed to Mr. Ezra Sensibar, and signed American Gypsum Company.

Government's Exhibit No. 575 for identification is a copy of a telegram, dated 10-3-33, addressed to the American Gypsum Company and signed—Ezra Sensibar.

By Mr. Knuff:

Q. Did you send the original of Government's Exhibit 572 for identification to the American Gypsum Company? A. Yes, sir.

Q. Did you receive, in answer to that telegram, Government's Exhibit 573 for identification? A. Yes, I did.

Mr. Knuff: I offer Government's Exhibits 572 and 573 in evidence.

Mr. Bromley: I object on the ground that they are completely immaterial.

Justice Stephens: Overruled; they are received in evidence subject to the usual reservation with respect to declarations of alleged co-conspirators.

(Government's Exhibits Nos. 572 and 573 were received in evidence.)

5245 By Mr. Knuff:

Q. Pursuant to the matter stated in the telegram, that you could come Monday or Tuesday, that is in the telegram—Exhibit 573—did you go to Port Clinton? A. Yes, I did.

Q. And did you go at about the time that was specified in the telegram? A. Yes, sir.

Q. Did you see Mr. Black? A. Yes, I did.

Q. Will you relate to the Court the conversation that you had with Mr. Black? A. I discussed with him the need that Cardiff Gypsum Company had for a wallboard and lath connection, and pointed out to him that it ought to be a very good thing for his company, especially since our sales territory reached out a good deal farther than his sales territory did, and in that way that it might increase his business immeasurably.

Mr. Black told me that from his point of view, as sales manager of the company, it was a desirable proposition, and that he would do all he could to put it through, but that the final decision would not depend on him or on his company, but would depend on what USG would permit them to do.

Q. At that time was any reference made as to your
5246 sales policies with reference to plaster? A. Yes. We discussed that at some length.

Q. Can you tell us what that discussion was? A. My recollection is that at that time there had been some specific complaint made—I can't remember now where the complaint was—as to some sale by Cardiff allegedly below the market price. He wanted some facts regarding that, so that he could use them in any discussion of the subject.

Q. And did you convey to Mr. Black the information that you had concerning the complaint he mentioned to you? A. Yes, I did.

Q. You cannot recall now the name of the specific job about which the complaint was made? A. No, I am afraid not.

Q. How long were you in Port Clinton at that time? A. All day, I think.

Q. When next did you see Mr. Black after your first trip to Port Clinton? A. I saw him at another time on a Sunday, several weeks later.

Q. Where? A. At his home.

Q. In Port Clinton? A. Yes, sir.

Q. And did you have any conversation with him at that time, and if so will you relate the conversation, if
5247 you can, and if you cannot, the substance of the conversation? A. Well, several weeks had elapsed, and I was pressing him for an answer on the matter.

Q. And by "an answer on the matter", what do you mean?

A. As to whether they would sell to Cardiff on the usual industry basis. He told me either that he hadn't been able to take it up with USG or hadn't gotten an answer. In any event, he didn't have an answer at that time, and he said that he would let me know shortly. It seems to me he said he was going to make a special trip to Chicago to talk to them about it.

Q. Did you receive from Mr. Black the letter that is marked for identification as Government's Exhibit 574? A. Yes, sir.

Q. And did you receive this from Mr. Black before your conversation with him on the Sunday that you mentioned, or after you had had that conversation? A. I think it was before.

Q. Before? A. I think so.

Mr. Knuff: We now offer in evidence Government's Exhibit 574.

Mr. Bromley: I object to it as immaterial to any charge in the complaint.

Justice Stephens: That is overruled and the ex-
5248 hibit is received in evidence.

Mr. Bromley: That will be subject to the usual reservation?

Justice Stephens: Yes. All of these are coming in, as far as they are statements by Mr. Black, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(Government's Exhibit No. 574 was received in evidence.)

By Mr. Knuff:

Q. Did you see Mr. Black after your visit to him at his home on the Sunday which you have just referred to, and if so where and when? A. Yes, I saw him after that, and I think it was about October or November, subsequent to that, at a Gypsum Association meeting.

Q. Where? A. I couldn't say.

Q. Where were the Gypsum Association meetings held? A. They were held in various cities. About half of them were in Chicago, and the others were held in Buffalo and elsewhere.

Q. And did you have any conversation with him at that time concerning the purchase of board at a discount? A. Yes, I did.

5249 Q. And what was that conversation, please? A. He told me that the USG had finally refused permission

for them to sell us, and that he had no particular hope of getting them to reverse the decision, and he thought for the time being we might as well drop the matter.

Q. Were you able to buy board from the American Gypsum Company? A. No, sir.

Mr. Bromley: At a discount?

Mr. Knuff: At a discount?

The Witness: No, sir.

Mr. Knuff: I now offer in evidence Government's Exhibit 575.

Mr. Bromley: The same objection.

Justice Stephens: Overruled. Received in evidence subject to the usual reservation with respect to declarations of alleged co-conspirators.

(Government's Exhibit No. 575 was received in evidence.)

Justice Stephens: The record may show that these exhibits are being received by the Court as connected with and showing a foundation for the conversations. They are not, of course, directly probative of the issue involved, but we think they are a proper preliminary foundation for the conversations which have been testified to.

5250 Mr. Knuff: That is all we are offering them for, your Honor.

By Mr. Knuff:

Q. Did you receive the telegram marked Government's Exhibit 575 before the conversation with Mr. Black at the Gypsum Association meeting, or after you had the conversation with him? A. I believe it was before that.

Justice Garrett: You asked him if he had received that—he sent it, didn't he?

Mr. Knuff: I should have said—Did you send this telegram to Mr. Black before the conversation that you had with him at the Gypsum Association meeting, or after the conversation that you had with him at the Gypsum Association meeting?

The Witness: Before, I believe.

Mr. Knuff: Thank you for calling that to my attention, your Honor.

By Mr. Knuff:

Q. Did you endeavor in 1933 to purchase board at a discount from any other gypsum manufacturer, other than the ones that you have mentioned? Now, I am limiting that question to 1933? A. Well, I believe I talked with Warren Henley of Certain-teed regarding that problem.

Q. When you say you believe you talked with
5251 Warren Henley, do you mean by that, that that is your best recollection? A. Yes, sir.

Q. And where did you talk with Mr. Henley? A. At his office.

Q. In Chicago? A. Yes, sir.

Q. And will you tell us the conversation that you had with Mr. Henley? A. It arose out of a general discussion regarding the Code that we were then working on. There were a number of questions involved on which there was a difference of opinion, and one was whether the situation should be created so that jobbers might exist in the industry. That was one of the matters discussed there.

Several of us met one day in his office to talk about that, to see whether we had anything in common on that subject. During that conversation the situation of Cardiff Gypsum came up, as a related question, and I pointed out to him at that time what we believed was the inequity of the existing situation.

Q. What did you point out? A. That Cardiff alone, of all of the independent plaster manufacturers, was not accorded a regular industry status.

Q. And by "regular industry status" what did you mean?

A. I meant the arrangement for the purchase of
5252 board and lath at a 15 percent and 12-1/2 percent discount.

Q. And you say you pointed that out to him? A. Yes, sir, I did.

Q. Go ahead with the rest of the conversation. A. And the question was discussed there as to whether that was a proper matter to treat in the Code, and it was his opinion—

Mr. Bromley: (Interposing) Can't we have more of the conversation and less conclusions about it, if the Court pleases?

Mr. Knuff: What I am interested in, Mr. Sensibar, right now, is the conversation that you had with Mr. Henley relative to buying board from him. Will you try to confine your answers to that particular phase?

Justice Stephens: State what Mr. Henley said, so far as you remember, or in substance and effect, on that subject.

The Witness: He said that he believed that that was a matter that ought to be treated among the companies involved rather than in the Code, and that he would undertake to try to do something about it as far as his company was concerned.

By Mr. Knuff:

Q. Did you ask Mr. Henley to be allowed to purchase board from Certain-teed? A. Yes, that is right.

Q. And what, if anything, did he say he would do?
5253 A. He said that he had been receiving a constant stream of complaints from his sales organization about situations where Cardiff had sold plaster off the market price, and that he would look into those and see whether he could convert some other members of the organization to his belief that they ought to do business with us.

Q. And did he explain what he meant by "some other members of the organization," or did he use those words? A. I don't remember, I am sure, what words he used. The thing that we were thinking about naturally was the salesmen of the company out in the various markets, the sales managers.

Q. Did Mr. Henley tell you that Certain-teed would sell board to Cardiff? A. No, sir.

Q. Did he tell you that they would endeavor to obtain the consent of USG to allow them to sell board at a discount to Cardiff? A. He said that first he would have to convert some other people in his own organization.

Q. That is in Certain-teed's organization? A. Yes, sir—and then it would be naturally a matter for USG to decide.

Q. And did you talk to him later about that? A. I spoke with him again—when you say "later", do you
5254 mean right after this time, right after this period?

Q. Well, at any time. A. Yes, sir. I opened the subject with him after the reorganization of the Cardiff Gypsum Company.

Q. What do you mean by the "reorganization of the Cardiff Gypsum Company"? A. The Cardiff Gypsum went through a 77-B reorganization—

Q. (Interposing) That was in 1935? A. Yes, sir.

Q. I will come to that later. But in 1933 did you talk to Mr. Henley as to whether or not he was able to obtain the consent of USG for Certain-teed to sell you board? A. Yes, the thing was discussed a number of times after that.

Q. And what was the discussion? A. As to whether he had received their consent, and he told me he had not.

Q. And were you able to buy board from Certain-teed? A. No, sir.

Q. And you never did buy any board from Certain-teed, is that correct? A. That is correct.

Q. Now, you spoke of a reorganization of the Cardiff Gypsum Company—just tell us what you meant by
5255 that, please. A. The Cardiff Gypsum Company was reorganized in 1935 under 77-B, and resumed business as a reorganized company in August of that year.

Q. Did the Cardiff Gypsum Company file a voluntary petition in bankruptcy under 77-B, or was there an involuntary petition filed, and later Cardiff filed a petition under 77-B? A. The latter is the case.

Q. That is, an involuntary petition was filed to declare Cardiff a bankrupt? A. Yes, in January of that year.

Q. 1935? A. That is right.

Q. And pursuant to that involuntary petition and acting in the bankruptcy courts, the Cardiff Gypsum Company filed a petition under section 77-B for reorganization? A. That is correct.

Q. And the company was reorganized and resumed business in August of 1935? A. That is right.

Q. Now, in 1935, did you endeavor to purchase board at a discount from USG? A. Yes, sir, we did.

Q. With whom in USG did you talk? A. I think first with Mr. Knode.

Q. I have reference to the year 1935. You talked
5256 with Mr. Oliver Knode during that year? A. Yes.

Q. And what was his position with the company at that time? A. He was either vice president or president.

Q. What conversation did you have with Knode? A. I told him about the reorganization of the company, that we had started in business again, and that Mr. Breen was no longer to have any active connection with the company, that I was taking an active hand in the management of it and in establishing the sales policies of the company; and I asked whether we might not be put on the usual industry basis with respect to the sale of board and lath.

Q. And what, if anything, did Mr. Knode tell you? A. I think he told me to take it up with Mr. Keady.

Q. Did you take it up with Mr. Keady? A. Yes, I did.

Q. And what was Mr. Keady's connection with the company? A. I believe he was vice president in charge of sales, or else sales manager at that time.

Q. You are not sure of his official position, his official title, with the company? A. No, sir.

Q. What, if anything, did you say to Mr. Keady? A. That since he was relatively a newcomer to the
5257 industry, I hoped we could start with a clean slate as far as both of us were concerned.

Q. What did you mean by that, that he was relatively a newcomer to the industry? A. That he had been in that position just a short time.

Q. By a "short time", what do you mean, a matter of years, a matter of months, or a matter of days? A. No, it might have been a year or so.

Q. Proceed. A. And that I felt that with him in an active, responsible position, we might be able to forget; in our discussions, these things that were persistently dragged in about what had happened years and years before, and that we might approach this question of the status of Cardiff purely on a business basis, and without any emotional bias about what had happened; and I asked him whether, from that point of view, he didn't regard it as a good thing for USG to treat Cardiff on the same basis as anybody else would be treated.

5258 Q. And by that what did you mean? A. Given the usual industry recognition with respect to the purchase of board and lath.

Q. What did Mr. Keady say to you, if anything? A. Mr. Keady said that it sounded perfectly reasonable to him but that he would have to take it up with some other members of the organization to see how people around the office felt about it.

Q. And is that all the conversation you had with Mr. Keady at that time? A. I think it is, in substance.

Q. Did you talk with Mr. Henning in 1935? A. Yes, sir.

Q. Before you talked to Mr. Keady or after you talked to Mr. Keady? A. I think before.

Q. Before? A. I think so.

Q. I think I asked you a little while ago with whom you first took up, in USG, in 1935, this matter, and you said that it was Mr. Knode, and that Mr. Knode then sent you to Mr. Keady— A. (Interposing): I believe I made a mistake. I believe that it was Mr. Charles Henning that I saw at that time, and that the discussions with Mr. Keady came later.

Q. Let's see if we can get it straight. With what 5259 official of U. S.G., in 1935, did you first take up the purchase of board, was it Henning or was it Knode? A. No, it was Knode, I am sure of that, and he sent me to Mr. Henning. I was mistaken when I said that Mr. Knode sent me to Mr. Henning.

Q. You say you were mistaken when you said that Mr. Knode sent you to Mr. Henning? A. I am sorry, I meant I was mistaken when I said that I took it up then with Mr.

Keady. Mr. Knode sent me to Mr. Charles Henning. It was a year or so later that I talked with Mr. Keady, not at this time in 1935.

Q. In 1935 you first talked to Knode, and Knode sent you to Henning? A. That is right.

Q. Are you clear on that? A. Yes, I am quite clear on that.

Q. You were mistaken before when you said that Mr. Knode sent you to Mr. Keady, is that correct? A. That is correct.

Q. And you wish to change your testimony? A. I do, yes.

Q. What, if anything, did you say to Mr. Henning, and what did Mr. Henning say to you, about the purchase of board? A. I reviewed with Mr. Henning the conversation
5260 that I had just had with Mr. Knode about the reorganization of the Cardiff Gypsum Company, and about the fact that I was taking or was going to take over the responsible management, and that they would no longer have to deal with Tom Breen, and that they could look forward to a different policy with respect to sales.

Q. Now did you tell him what your policy would be? A. Yes, sir.

Q. And what did you tell him your policy would be in the future? A. That we would expect to have a normal dealer policy, giving up the policy of the old company of selling directly to contractors.

Q. And will you explain just exactly what you mean by "normal dealer policy"?

Mr. Bromley: I object to that unless he told it to Mr. Henning.

By Mr. Knuff:

Q. Did you use the words "normal dealer policy" in your conversation with Mr. Henning? A. I wouldn't be sure of the word "normal"; but I would as to the words "dealer policy".

Q. And did you explain to Mr. Henning what you meant by "dealer policy"? A. I don't think so.

Q. What did you mean by "dealer policy"?

5261 Mr. Bromley: I object to that as incompetent, if he didn't tell Mr. Henning what he meant by it.

Justice Stephens: It may be possible for the witness to explain that it was a phrase which had a common meaning to him and to Mr. Henning. We will have to see. Subject to a motion to strike, you may answer.

By Mr. Knuff:

Q. What did you mean by the use of the expression "dealer policy"? A. It refers to a policy by a manufacturer under which he expects to, and does, make a very high percentage of his sales directly to building material dealers, rather than directly to contractors.

Q. And did you explain to Mr. Henning at this time what your price policy would be? A. Yes, sir.

Q. What did you tell Mr. Henning your price policy would be? A. That we expected to get the full market price.

Q. The full market price? A. Yes, the full price prevailing at any particular time in any particular market.

Q. Just go on and tell us the rest of the conversation that you had with Mr. Henning, please? A. I pointed out
5262 to him that if they expected Cardiff to turn over a new leaf with respect to sales policy, that they also had to give some cooperation; that they couldn't very well expect to set rules under which a company couldn't make a living, and at the same time have them abide by those rules; and that part of the solution to that problem would be to put Cardiff on the same basis as anybody else, and not treat them as an outlaw, but give them the right to sell board and lath on the usual basis.

Q. What, if anything, did Henning say to you? A. His reply to me was that my position was sound, but that he doubted very much whether he could put it over in his organization; that everybody would be afraid that if they gave us board and lath to sell, we would use our plaster in order to sell the board and lath.

Q. And did you give Mr. Henning any assurances as to what your conduct would be, in that event? A. Yes, I did.

Q. Will you tell us what you told Mr. Henning? A. I explained to him that we were in no position, considering our production costs, to sell plaster in any market consistently under the market price; that we had no intention of doing it; and that giving us these other products to sell, which were extremely necessary to the financial health of the company, would probably be the best assurance they could hope to have that that policy would be carried out.

5263 Q. Was there any other conversation at that time with Mr. Henning? A. Only that he would discuss it with his organization and let me know.

Q. Did you see Mr. Henning sometime after that? A. Yes, I did.

Q. About how long after this first visit with Mr. Henning was it until you saw him the second time? A. Oh, a matter of weeks, perhaps four, or five, or six weeks, or something like that.

Q. Where did you see him, at his office? A. At his office in Chicago, yes.

Q. And did you have any conversation the second time about the purchase of board from USG? A. Yes sir.

Q. And will you tell us just what the conversation was, please? A. I pressed him for a favorable decision on it, and he told me that there were people in his organization who were still not willing to believe that we would sell, or continue to sell, plaster at the going prices; that he had had some good reports about what we had done during those few months since the reorganization, but that it would have to be a matter of time to convince the others in the organization.

Q. And were you able, in 1935, to buy board from
5264 USG at a discount? A. No sir.

Q. Did you contact any other companies in 1935 in an endeavor to purchase board at a discount from them? A. National.

Q. In 1935? A. In 1936, probably.

Q. 1936? A. Yes.

Q. Well, now, can you tell us what time in 1936 it was that you contacted National, whether it was in the Spring or Summer, or when? A. I can't place it very accurately.

Q. I would like to show you what has been marked for identification as Government's Exhibit 576, the same being a letter, dated February 1, 1936, addressed to Mr. Arthur Black and signed by Ezra Sensibar.

(The document referred to was marked for identification as Government Exhibit No. 576.)

(The document referred to was handed to the witness for examination)

By Mr. Knuff:

Q. Will you please look at that letter and tell us whether or not that is your signature thereon? A. Yes sir,
5265 it is.

Q. Now in view of the date in that letter, do you care to change your testimony as to which company you first contacted in 1936 with reference to the purchase of

board? A. Yes, it was the American Gypsum Company.

Mr. Knuff: I now offer in evidence Government Exhibit No. 576.

Mr. Bromley: I make the same objection.

Justice Stephens: The objection is overruled, and the document is received in evidence subject to the usual reservation with respect to declarations of alleged co-conspirators.

(Exhibit No. 576 was received in evidence)

Justice Stephens: We will take the afternoon recess at this time. Before we adjourn I want to state that at the time the opinion of the Court on the motion to strike Paragraph 46(a) was copied into the record, my secretaries did not have time to proof read it. During recent recesses they have very carefully proof read it and have found a number of clerical errors. Also I made in the original opinion, which is filed with the Clerk, one or two minor changes in diction. None of these affect the sense or substance of the opinion.

For the convenience of the court reporter, during the recent recess I asked him informally to make these corrections in the record, but I wish now to cover it by a
5266 formal order and I hand to the Court reporter the list of corrections, to be copied into the record at this point.

(The list of corrections referred to is as follows:)

Memorandum of corrections to be made in the transcript—pages 684-731—Paragraph 46(a)

Opinion

684—Line 7 change "are" to "is"

685—Line 21 Change initial M. in the name Ernest M. Oliver to initial H.

689—Line 20 Correct spelling of word Dodge from Doge to Dodge

690—Line 13 Strike out the letter e in the word Roose

692—Line 14 Change letter d to letter s in the word involved

694—Line 5 After the word decision add a comma and the words and is so that the line will read: is a District Court decision, and is from another jurisdiction, it is

694—Line 12 Strike out the word unreported and in lieu thereof add the following: 51 F. Supp. 972

—Line 13 Strike out Oct. 4,

696—Line 4 After the closing quotation mark add the following: (51 F. Supp. at 973)

5267 697—Line 17 Change the parentheses to brackets around 167 U. S. 264-5 and around Italics supplied

698—Line 8 Correct the word action to acting

702—Line 1 Correct the use of periods and parentheses in this line as follows:

conclusive upon that point . . . . [92 U. S. at 351]

Spacing of periods and use of brackets are correct as above appears.

—Line 15 Change the parentheses to brackets around 94 U. S. at 196

705—Line 11 Change the parentheses to brackets around the letter s following the word patent

709—Line 2 Strike out the word a at the end of the line

710—Line 16 Strike out the word to before the word be

712—Line 5 Add the letter s to the word consideration

—Line 24 Change the parenthesis to a bracket before the word Rev.

—Line 25 Change the second parenthesis to a bracket after the date (1940)

713—Line 13 Change the parentheses to brackets around the words the claimants

715—Line 2 Change the words over reaching to the word overreaching

5268 716—Line 18 Change the parenthesis to a bracket before the word the

—Line 19 Change the parenthesis to a bracket after the word mentioned

717—Line 12 Change the parentheses to brackets around 167 U. S. at 269-270

717—Line 13 Change the parentheses to bracket around the words Italics supplied

—Line 19 Change the parentheses to brackets around 167 U. S. at 268

718—Line 18 Change the word to to the word of

719—Line 18 Correct the use of periods and parentheses in this line as follows:

be collaterally impeached. . . . [255 U. S. at 488]

Spacing of periods and use of brackets are correct as above appears.

720—Line 4 Capitalize the word court

—Line 23 Change the parentheses to brackets around Citing cases and 234 U. S. at 691-2

721—Line 2 Lower case the letter P in the word Paragraph

—Line 14 Indicate a space between the words for incidental

723—Line 3 Change the word manner to the word means.

5269 725—Lines 1 to 12—Strike out all of this heading

726—Line 15 Strike out the quotation mark before the word Suits and indicate a paragraph commencing with the word Suits

—Line 24 Strike out the last two asterisks and the quotation mark

—Line 25 Change the parentheses to brackets around Italics mine

727—Line 19 Change the word which to the word that

728—Line 19 Strike out the fourth asterisk

730—Line 8 Correct the spelling of the word valid from vaild to valid

731—Line 18 Indicate a space between the words present trend

(Thereupon, at 4:05 o'clock p. m., a recess was taken until 10:00 o'clock a. m., Friday, March 24, 1944.)

5271 IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA,

Plaintiff,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS,

Defendants.

Seventh Floor,
Internal Revenue Building,
Washington, D. C.,
Friday, March 24, 1944.

The above-entitled cause came on for further hearing at 10:00 o'clock a. m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

APPEARANCES:

(Same as heretofore noted.)

5275 Thereupon, EZRA SENSIBAR the witness on the stand at the time of adjournment, resumed his testimony as follows:

Direct Examination (resumed)

Justice Stephens: Are you ready?

Mr. Knuff: Yes, Your Honor.

Justice Stephens: Very well, proceed.

By Mr. Knuff:

Q. Mr. Sensibar, at the conclusion of the proceedings yesterday evening, I believe you had before you the letter of February 1, 1936, Government's Exhibit 576? A. Yes, sir.

Q. Did you, sometime previous to the letter, Government's Exhibit 576, contact Mr. Arthur Black with reference to purchasing board from the American Gypsum Company at a discount? A. Yes, sir, I did.

Q. Will you relate the circumstances of that conference with Mr. Black, please, giving us the date, as near as possible; the place where you saw him; and, as nearly
5276 as you can, the conversation that you had with him?

A. That was some time, some few months, after we resumed business, when the company was reorganized in August, 1935. I dare say it was November or December of that year. I visited him at Port Clinton, in line with a suggestion that he had made several years before, that when conditions changed, and after some experience with our company's policy in the industry, something might be done in the way of a board connection.

We discussed the situation as to what changes had taken place in the attitude of the industry toward Cardiff Gypsum Company, and whether something could be done about a board connection.

He told me that a matter that had been brought to his attention, in the nature of a complaint, concerned our sale of plaster on a Government housing project in Indianapolis, which was called the Community Housing Project, and that there had been some allegation that we had sold plaster below the prevailing market price, and that he thought he ought to have information about that in order to be able to proceed with our request to establish a board connection.

I gave him the data on it at that time.

Q. What did you tell him at that time? A. I told him the dealer to whom the material had been sold, and the price, and the conditions of sale, so that he might
5277 check and see whether they were the reigning conditions at the time or whether they did, in fact, establish a new low market price.

Justice Jackson: Did you mean "reigning" or "prevailing"?

The Witness: "Prevailing".

By Mr. Knuff:

Q. Go ahead, Mr. Sensibar. A. I think that was the substance of the conversation, before this letter.

Justice Jackson: Was that the Severin job that is mentioned in this letter?

The Witness: Yes, sir.

By Mr. Knuff:

Q. Will you look at the second sentence of the second paragraph in Government's Exhibit 576, and tell me what you meant by the expression: "that the transaction was handled in the method customary in the industry and approved by yourself and others"? A. That is, that the sale was made through a recognized local dealer.

Q. And at what price? A. At the prevailing market price.

Q. Now, when you had this conversation with Mr. Black, did Mr. Black tell you that he would contact USG?

5278 A. Yes, he did.

Q. And what did he tell you concerning that? A. He told me that he would first investigate the figures that I had given him. He told me at the time that he had no doubt that I was telling him the truth about the matter, but he wanted to confirm it; and that after confirming it, if he was satisfied, he would then take it up with USG and see whether he could get permission to sell us board.

Q. I show you what has been marked for Identification as Government's Exhibit 577, the same being a letter dated February 10, 1936, addressed to Mr. Ezra Sensibar, and unsigned.

(The document referred to was marked as Government's Exhibit No. 577 for Identification.)

(Government's Exhibit No. 577 for Identification was handed to the witness.)

By Mr. Knuff:

Q. Did you receive the original of that letter, sir? A. Yes, I did.

Q. And whose signature appeared thereon? A. Arthur Black's signature.

Mr. Knuff: We offer in evidence Government's Exhibit No. 577.

5279 Justice Stephens: Let us read it.

(Government's Exhibit No. 577 for Identification examined by the Court.)

Justice Stephens: Is there any objection?

Mr. Bromley: We make the usual objection, and the further objection that it is immaterial.

Justice Stephens: Received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 577, was received in evidence.)

By Mr. Knuff:

Q. After receiving Government's Exhibit 577, did you have any further conversation with Mr. Black? A. Yes, I did.

Q. Where? A. I believe in Chicago.

Q. When? A. I would say within a month after that time.

Q. What was discussed at that time? A. I pressed him then for an answer on the board question. He was in Chicago, as I recall it, and had discussed it with USG; and he told me that there was simply no chance, that he didn't think that they could get USG to change their earlier

5280 opinion about the matter.

Mr. Bromley: I take it, when the witness said that Black talked to USG, he means that Black told him that he talked to USG—is that right?

Justice Stephens: Is that what you mean?

The Witness: Yes, sir.

By Mr. Knuff:

Q. Did he tell you any conversation or any statements that any representative of USG had made? A. No, I don't think so. At least, I can't remember.

Q. Were you able to purchase board from American Gypsum Company at a discount, in 1936? A. No, sir.

Q. Were you ever able to purchase board from American Gypsum Company at a discount? A. Never.

Q. Did you make any further efforts, after your talk with Mr. Black in early 1936, to purchase board from American Gypsum Company, at any later time? A. Well, in a general way, after they were taken over by Celotex, which was some time later.

Q. But not from American? A. No, sir.

Q. Now, did you talk with any other manufacturer, in 1936, concerning the purchase of board at a dis-
5281 count? A. Yes, sir.

Q. What manufacturer did you talk to? A. National.

Q. With whom in National did you talk? A. At various times, with Mr. Baker and with Mr. Burley; and later, I think, with Mr. Best.

Q. Mr. John Best? A. John C. Best.

Q. Can you tell us when you first contacted Mr. Baker? A. It was shortly after National took over the Universal mill at Fort Dodge.

Q. Can you give us the approximate year when that was? Was it 1936 or 1937? A. I think it was 1936, Mr. Knuff.

Q. You are not sure, but you think it is 1936, however? A. That is right.

Q. Where did you see Mr. Baker? A. Well, these conversations took place over a period of about two years, I would say, and I saw him several times in Buffalo.

Q. Where did you first see him, if you can recall? A. I can't recall.

Q. You can't recall? A. We were seeing each
5282 other every 3 or 4 months, and I can't tell you just where it was we first talked about it.

Q. What did you talk about, with Mr. Baker, concerning the purchase of board, if anything? A. That inasmuch as they now had a mill at Fort Dodge, that he would seem a logical party with whom to make a deal on the purchase of board. And I discussed with him, somewhat as I had with the others, the situation of Cardiff in the industry, our new sales policy; and I asked him to confirm what I told him regarding the new sales methods of the company, which had then been operating about a year or so since its reorganization; and I asked him whether we couldn't make a deal on board and lath.

Q. That is, by "making a deal", did you mean that you wanted to purchase board and lath? A. That is right, on the usual industry basis.

Q. What did Mr. Baker say, if anything? A. My recollection is that at first he said to hold the matter in abeyance a little while, until they got their own sales situation better organized. After time went on, he referred me to Mr. Harrison, who was the Division Sales Manager at Chicago, and told me it would depend a good deal on the recommendation that Mr. Harrison would make.

Q. You say later on—you mean that he told you to
5283 see Mr. Harrison sometime in 1936? A. That might have been 1937, Mr. Knuff.

Q. Did you see Mr. Harrison? A. Yes, sir. I had quite a series of conferences with him. That carried on over the better part of a year, I should say, into 1938.

Q. Can you tell us about the number of conferences that you did have with Mr. Harrison? A. Perhaps half a dozen.

Q. What did you say to Mr. Harrison, if anything, and what did Mr. Harrison say to you? A. I pointed out to him our need for this product to sell in connection with our plaster; furthermore—

Q. (Interposing) What did you point out to him? A. That we had some 10 or 11 salesmen, covering a certain territory, who were selling only plaster, at the time; and that from the sales effort point of view, they could just as well—in fact, much more easily—sell board along with the plaster; that it would result in considerable increase in their own outlet for board, for plasterboard; that, furthermore, the commissions allowed in the industry were such that they would probably make a greater profit on the board that they would sell to us for distribution, than on the board that they would sell themselves, because that 12-1/2 or 15 percent did not cover sales and administrative expense.

5284 He recognized those things, and said that in his opinion it would be a good thing for the company to make the connection, for the National Gypsum Company to make the connection with us, and offered to recommend it and push it as much as he could.

He made some suggestions with respect to a letter that I should write to the company, and some of the things I should say in it.

Q. What representations did he tell you to make to the company? A. He suggested that I should explain this situation, that in almost every city or town there are some dealers to whom, for one reason or another, National was

not able to sell its products; and that by reason of a distribution through us, possibly under our own name, we would be able to reach those dealers, and so increase their sales among dealers who were now not productive of any business.

Q. Did you write that letter? A. Yes, sir.

Q. To whom did you write it? A. I think to Mr. Baker.

Q. Do you have a copy of that letter? A. Yes.

Q. Where is the copy of that letter? A. I don't
5285 know, sir. I haven't been able to locate it for some time.

Q. Well, when you say you have a copy of it— A. (Interposing) I thought you said "had".

Q. No, I said "Do you have a copy of it? A. No, sir.

Q. Have you endeavored to find a copy of that letter? A. Yes, sir, I have.

Q. And you say you have been unable to locate that copy? A. That is right.

Q. Can you tell us the date of that letter, the approximate date of it? A. I think it was in the fall of 1938.

Q. In the fall of 1938? A. Yes, sir.

Q. And what, if anything, did you say in that letter?

Mr. Bromley: I object to that as incompetent.

Justice Stephens: Where is the original?

Mr. Knuff: We have asked the National Gypsum Company to supply us with all letters, and so forth, under the subpoena, and we have never received it from the National Gypsum Company. Mr. Sensibar has said that he hasn't been able to locate his copy of it.

Mr. Finck: If the Court please, I would like to ask if
they requested this specific letter? I have no in-
5286 formation on that.

Mr. Knuff: No, I don't think that we mentioned the letter by date, or anything else. It was covered by the blanket subpoena.

Mr. Finck: We submitted, under the subpoena, a complete file of all the correspondence with Mr. Sensibar. If that letter had been sent, I am sure that you would have it.

Mr. Knuff: We don't have the letter, Your Honor.

Mr. Finck: I object to the testimony of this witness on such a letter.

Mr. Knuff: I won't press it.

Mr. Bromley: I move to strike out the answer that he gave as to what was contained in the letter.

Mr. Knuff: He didn't say what was contained in the

letter, he said that Mr. Harrison suggested certain things to be put in the letter, and I asked him what Mr. Harrison suggested.

Justice Stephens: I thought he said he wrote a letter to such effect.

Mr. Bromley: He did.

Justice Stephens: If there is any dispute about it, we can have it read back, but I think that is what he said.

Mr. Knuff: That may be true, I am not sure.

Justice Stephens: Since you don't press it, let the record show that that is stricken, if it was stated.

Mr. Knuff: I want to be sure that the only thing
5287 that is stricken is that he wrote such a letter. I want to make sure that what he said Mr. Harrison told him does not go out of the record.

Justice Stephens: That is not being stricken.

Will you read that part, Mr. Grover?

(The record was read by the reporter as requested.)

Mr. Finck: If the Court please, I move to strike all of the testimony given regarding the conversation with Mr. Harrison as to what this witness should write to Mr. Baker. We should not be bound by Mr. Harrison's instructions to Mr. Sensibar, whatever they were. He was not an officer of National Gypsum Company.

Justice Stephens: Who was Mr. Harrison?

Mr. Finck: He was the Central District Manager, located in Chicago.

Mr. Knuff: And he is the gentleman that Mr. Baker suggested Mr. Sensibar contact.

Justice Stephens: It seems to the Court that that motion ought to be denied, Mr. Finck. A man doesn't have to be an officer of a corporation to have apparent authority to make statements. But since you don't press for the contents of the letter, Mr. Knuff, the Court is in doubt as to whether or not the words "I wrote that letter" ought to
stay in, because that, to an objective reader of the
5288 record, might indicate that the contents of the letter were what Mr. Harrison had suggested be written.

So the Court will strike out the answer, "I wrote that letter", or the answer to that effect; and you may examine the witness again, Mr. Knuff, to bring out that he wrote a letter, since you do not press for the contents of it.

By Mr. Knuff:

Q. Following that conversation with Mr. Harrison, did you write a letter—

Justice Stephens: (Interposing) Just a moment. Judge Jackson thinks I haven't made clear that I denied Mr. Finck's motion. It is denied.

By Mr. Knuff:

Q. Following your conversation with Mr. Harrison, did you write a letter to Mr. Baker? A. Yes, sir, I did.

Q. Now, you have testified that your first contact with Mr. Baker was in 1936, and you testified as to what was said to Mr. Baker at that time. When next did you see Mr. Baker? A. I am afraid I can't put it any more precisely than that I used to see him generally every 3 or 4 months.

Q. I see. And what other conversations, if any, did you have with Mr. Baker at the other times that you saw him, concerning the purchase of board? A. Well, in the
5289 fall of 1938, this long negotiation over this 2-year period was pretty much coming to a head, and I remember making one or two trips to see Mr. Baker,—one time particularly, to Buffalo,—to press for a favorable decision on this thing.

I pointed out to him then that we had been operating some three years since the company had been reorganized, and that if we were ever going to receive any favorable recognition from the industry, it ought to be about time to do something about it.

I told him that based on our experience, we didn't have any great hope that USG would give him that permission without considerable pressure on his part, and I asked him point-blank whether National Gypsum was prepared to make an issue of the matter, or whether they were going to let it go by the board.

He told me then—and I think this was the last conversation on the subject—that USG had turned it down; that National could probably sell us had they been willing to make an issue of it, but that there were other reasons why they didn't want to make an issue of it.

He told me that he considered it unfair to us; that he thought the doors should have been opened to us on some basis or other; and that we could count on his personal

support as time went on; but that that, for other
5290 reasons, simply wasn't the moment when National could make an issue of it, and that the best thing to do would be to drop it.

Q. At any time, did Mr. Baker suggest that you contact any person in USG in order to expedite any consent that was necessary from USG? A. Yes, sir.

Q. When did he tell you to do that? A. It was toward the end of this period of negotiation. I had 'phoned him several times about bringing the matter to a head; and one day, during a conversation with him, he said that it would be well for me to contact Mr. Keady in Chicago, and press it from that end; and that he would push the matter from Buffalo. He told me that there had been some delay in getting an answer from USG on it, and he thought that might help.

Q. Did you contact Mr. Keady? A. Yes, sir. I saw Mr. Keady about the matter, I would say, twice, at that time.

Q. When did you see him the first time? A. Well, the two times were pretty close together, about 3 or 4 weeks apart, and were in the fall of 1938.

Q. And what conversation did you have with Mr. Keady? A. I explained to him our request to National, and that I understood that National was taking the matter up with them; and that I was there to answer any questions
5291 that he might have as to our sales policies, price policies, or anything else that might be of interest to them in helping them to reach a favorable decision on the matter.

Q. What did Mr. Keady say to you? A. He asked me a number of questions about the status of the company, its ownership; about its markets; its sales organization, and so on—which I explained to him.

I also pointed out to him the benefits that would be derived out of such a deal for USG and the industry as a whole.

Q. What did you point out? A. That it simply wasn't a healthy thing for a large company, dominating that kind of a situation, to keep a small competitor from having the same recognition as other people; that this thing had been going on at that time for 3 years, since the reorganization, and during those three years we had adhered to the sales practices established by USG, with one exception, and that exception consisted of the fact that we did make truck deliveries directly out of Fort Dodge, in a different territory than they did, but that that thing was forced on us by the

very fact we didn't have this board so we couldn't load full cars, and that we would be willing to give up that sales practice as soon as we had the board. And I naturally urged on him to do what he could to grant the consent to National.

5292 Q. What did Mr. Keady say to you? A. He told me that so far as he was concerned, while he had every sympathy with our situation, he considered it a fixed policy of the company that they were not going to allow it. He told me that so far as he was concerned, that matter was final.

Q. Did you ever have any further conferences with Mr. Keady and any other officers of the corporation? A. Yes, sir. During this same period, and I think shortly after these talks with Mr. Keady, I went to see Mr. Knode about it, thinking that it might still be possible to get a reversal of that attitude.

Q. And what was the conversation that you had with Mr. Knode, and who was present at the time? A. I believe there were two meetings with Mr. Knode. One was of a preliminary nature.

Q. Who was present at that time? A. Just he and I.

Q. What was discussed? A. I told him the history of Cardiff's business during the previous 3 years, and pointed out to him that we were again raising this question of being put on a par with other independent members of the industry; and that we really wanted it given serious consideration, because it had become a very serious matter for us.

5293 He suggested that I talk with Mr. Keady, and that resulted, a little later, in a joint conference with Mr. Knode and Mr. Keady and a Mr. English.

Q. Who was Mr. English? A. I understood him to be a Director of the company, from California.

Q. And, before you had this joint conference, have you related all the conversation you had with Mr. Knode? A. Have I related it all?

Q. Yes, before the joint conference. Disregard the joint conference for the moment. Have you told us what you remember as to the conversation that you had with Mr. Knode? A. Yes, sir.

Q. At this conference with Mr. Knode, Mr. Keady, and Mr. English, and yourself, was there any other person present? A. No, sir.

Q. Just the four of you? A. Yes, sir.

Q. Now, what was said at that conference? A. Well, after some introductions—because I hadn't known Mr. English—we got down to the meat of the matter, and I reviewed for them, as fully as I could, the history of our operations during those three years since the reorganization. I pointed out to them that we had started from scratch in August, 1935, with no business, because
5294 we had been completely out of the market for nearly a year; and that it had cost us a great deal to build up a sales organization and to develop a trade again; that we had done that during a period of 3 years at considerable sacrifice, and as consistently as we could along the lines of the policy laid down by USG for their own sales. I pointed out to him that we had—

Q. (Interposing) You say to "him", were you talking to just one person? A. I was seated at Mr. Knode's desk, and the other two gentlemen were seated a little further back, and I was directing my conversation to Mr. Knode.

Q. Go ahead. A. I pointed out to him that there were a number of things that hampered us, and to some extent hampered other independents in the industry. I pointed out that one of those was the freight rate manipulation that had been going on; that another was the peculiar use of basing points; and that so far as we were concerned, perhaps the most serious was this constant inability to make the same kind of a board connection that everybody else had.

I suggested to him that it just wasn't a healthy thing in an industry to let that kind of a thing prevail, and that it seemed strange that a company the size of USG would insist on maintaining that kind of a situation.

I pointed out to him, also, that we had a competitor
5295 right across the tracks from us, who was an independent operator, who had for years enjoyed just the kind of a board connection that we were talking about.

Q. What was that competitor's name? A. Wasem Plaster Company.

Q. Go ahead. A. I told him that it was simply the ordinary business connection prevailing in the industry; I told him that I would substantiate my statements as to sales prices and terms, and that they were welcome to look over our books and see what they showed, to verify my statements.

His response was, in substance, this,—that USG had spent $60,000,000 or $70,000,000 developing the business;

that they had that, at one time or another, invested in their plants; that it would cost at least a half a million dollars to establish a board mill; and that they were not disposed to make available to us facilities of their board plants on any kind of a basis; that if we wanted board, then the thing we ought to do was to decide to build a board mill, and if we could then come in with a showing that we had the money available, that they would then consider granting us a license.

Q. Now, did Mr. Keady or Mr. English say anything at this conference? A. Very little.

5296 Q. Was there anything said after Mr. Knode told you that USG would consider granting Cardiff a license? A. Yes. I told him that that was not the subject of our discussion; and I again pressed him on the matter, pointing out the unfairness of it, pointing out that a number of members of his organization, beginning with Mr. Henning, had recognized the inequity of that situation. I suggested to him that it might be a matter that had some legal aspects to it; and I suggested that without going to any trouble about it, we place the question before some proper agency in Washington, and see whether we could get an advisory opinion on it.

Q. What else was said, if anything? A. He rejected that, and indicated that the decision was final, that they would do nothing about it.

Q. Now, we got into this discussion of the conference with the United States Gypsum Company because of my first question concerning your contacts with Mr. Baker in 1936. Did you talk with anybody else in National in 1936? A. Yes. Beginning in 1936, and through those two years, besides talking with Mr. Baker and Mr. Burley and Mr. Harrison, I also talked with John C. Best from time to time.

Q. You haven't mentioned Mr. Burley before; you have mentioned Mr. Baker and Mr. Harrison. Did you
5297 have any conversation with Mr. Burley? A. I am sorry if I didn't mention Mr. Burley. I think I did.

Q. You may have. My recollection is that you hadn't. A. They were separate conversations. I sometimes talked with Ralph Burley, and sometimes with Mr. Baker.

Q. What was your conversation with Mr. Burley? A. It was generally—

Mr. Bromley: (Interposing) When, please?

The Witness: Beginning in 1936.

(Continuing) —It was generally on the subject of

specific sales, specific orders. During that period I had under discussion with them the question of supplying us with Keene's Cement, and white finishing plaster, which they made out in Kansas, and that was a question apart from the board question.

By Mr. Knuff:

Q. Well, just confine yourself to the board conversations that you had with Mr. Burley. A. They were only general, and would be more or less a repetition of what I had been saying to Mr. Baker, with the idea in mind of getting the organization favorable to this project.

Q. At the risk of being repetitious, what did you say to Mr. Burley, and what did Mr. Burley say to you?

5298 A. I pointed out to Mr. Burley the need that Cardiff had for such a connection, the common one in the industry. I pointed out to him how it would be helpful to his own company, and would very likely diminish some of the resistance that he had, in selling his product, with certain dealers. And I asked him for his backing, with Mr. Baker, in seeing this proposition through.

Q. What did Mr. Burley tell you, if anything? A. Mr. Burley told me that he had been very favorably impressed with the new sales policy of Cardiff; that he was, generally speaking, getting good reports through his salesmen and sales managers; and that he thought the time had come to change the situation, and that he would do what he could with Mr. Baker.

Q. Now, did you have more than one conversation with Mr. Burley? A. Yes, sir.

Q. And have you told us everything that was said to Mr. Burley, and that Mr. Burley said to you, relative to the purchase of board, at this first conversation with him—have you told us everything about that? A. Yes, sir.

Q. When next did you see Mr. Burley, if you did see him again? A. I couldn't—

5299 Mr. Finck: (Interposing) Can you fix the date of the first conversation a little more clearly?

By Mr. Knuff:

Q. Can you fix the date of the first conversation with Mr. Burley? A. Sometime shortly after the taking over of Universal by National.

Q. Was it before your first conversation with Mr. Baker, or after your first conversation with Mr. Baker? A. I

think it was before. I think I first opened it with Mr. Burley.

Q. You first opened the negotiations with Mr. Burley, is that correct? A. Yes, sir.

Q. Now then, when did you talk with Mr. Burley again? A. From time to time throughout this two-year period, Mr. Knuff. I couldn't tell you the dates.

Q. Can you give us the number of conversations, or the approximate number of conversations, that you had with Mr. Burley concerning Cardiff's purchase of board at a discount, from National? A. Three or four, I dare say.

Q. And was the substance of all the conversations that you had with Mr. Burley, similar to the conversation that you have now related that you had with Mr. Burley?

5300 A. Yes, sir.

Q. Did you add anything to later conversations that was not discussed in the first conversation with Mr. Burley? A. Well, I remember once asking him how long this thing was going to go on. I told him there was a limit to most anybody's patience, and that we had been knocking at this door, now, for several years, and always got the same kind of an answer, that "some day in the future it will be opened, but it isn't now".

I asked him how long he thought that ought to continue. His opinion was, he told me, that it was time for the gypsum industry to do something about it; that he thought we had done our share, and that he was satisfied that we would do more if they would do something about it; and he undertook to help all he could.

Q. You have testified that you were in Buffalo in the fall of 1938, is that correct? A. Yes, sir.

Q. I want to show you what has been marked for Identification as Government's Exhibit 578, the same being a letter dated October 24, 1938, addressed to Mr. Ezra Sensibar, and signed M. H. Baker.

(The document referred to was marked as Government's Exhibit No. 578 for Identification.)

5301 (Government's Exhibit No. 578 for Identification was handed to the witness.)

By Mr. Knuff:

Q. Will you tell us whether you received that letter? A. Yes, sir.

Mr. Knuff: We offer in evidence Government's Exhibit No. 578.

Mr. Bromley: We make the usual objection, and also object on the ground that it is immaterial.

Justice Stephens: The objection is overruled, received in evidence subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 578, was received in evidence.)

Justice Stephens: Announce the morning recess.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

5302 Justice Stephens: You may proceed.

By Mr. Knuff:

Q. Mr. Sensibar, during the recess have you had an opportunity to think over your testimony as to the conference with the United States Gypsum Company's officials, that is, Mr. Knode, Mr. Keady, and Mr. English? A. Yes sir.

Q. Do you wish to add anything to what you previously told us about what was said at that conference? A. Yes sir, I do.

Q. Would you proceed, please? A. When I made the point with the gentlemen that the arrangement that we were seeking and had been seeking for three years, was simply the usual one in the industry, Mr. Knode said that it was no longer the practice of USG to make those deals; that the one with Wasem was very old at that time, was of long standing; and it was not their policy to make any more arrangements of that kind.

I then suggested to him my understanding that during that very period since we had become interested in Cardiff, they had made other such arrangements—

Q. (Interposing) Did you mention the name of the company that you had in mind at that time? A. I believe I did not.

5303 Q. You believe you didn't? A. That is right. I don't think there was any question about it, we all knew who it was.

Q. What did Mr. Knode—

Mr. Bromley (Interposing): I move to strike that last out as a conclusion, "I don't think there was any question about it, we all knew who it was."

Mr. Knuff: I think it should come out, your Honor.

Justice Stephens: It may be stricken.

By Mr. Knuff:

Q. What, if anything, did Mr. Knode or Mr. English or Mr. Keady say when you called their attention to the fact that similar arrangements had been made with a company other than the Wasem Plaster Company? A. Well, that was covered by Mr. Knode's general statement that they weren't making any deals of that kind during that period, and that the existing ones were old.

Q. Now, Mr. Sensibar, will you please look at Government's Exhibit 578, and particularly at the second paragraph of that exhibit. In any of your conversations that you had with Mr. Baker, did Mr. Baker ever suggest that their plant capacity was limited in any manner? A. No sir, never.

Q. When did you first hear that National's plant wasn't of sufficient capacity to take care of this business that
5304 you were offering— A. (Interposing) When I received this letter—

Mr. Bromley: (Interposing) I object to that on the ground that it assumes facts not in evidence, and I move to strike out the answer. That is not what the letter says. It says, "Any substantial upturn will consume our capacity."

Justice Stephens: That is correct, the answer may be stricken.

By Mr. Knuff:

Q. Mr. Sensibar, at any conversations that you had with Mr. Baker, was the capacity of the National Gypsum Company's plants ever discussed with you? A. No sir.

Mr. Knuff: I believe I have offered Government's Exhibit 578.

Justice Stephens: Yes, that has been received in evidence.

By Mr. Knuff:

Q. Now, at page 5546 of yesterday's transcript, beginning with line 7, the following appears:

"A. The Cardiff Gypsum Company went through a 77-B reorganization—

"Q. (Interposing) That was in 1935? A. Yes, sir.

"Q. I will come to that later. But in 1933 did you talk to Mr. Henley as to whether or not he was able to

obtain the consent of USG for Certain-teed to sell you board?"

5305 Did you mean to infer that in 1935 you talked with Mr. Henley concerning the sale of board? A. No sir.

Q. After 1933, when next did you take up with Certain-teed the question of purchasing board from them at a discount, if you did take it up?

Mr. Bromley: I am sorry, but I have lost track—may we have those last few questions about Certain-teed read?

Justice Stephens: Yes, you might. Read them, Mr. Reporter.

(Thereupon the reporter read the record as requested.)

Justice Stephens: Answer the pending question.

The Witness: It was about 1939, it might have been in 1938. In any event, it was right after the new management came in.

Justice Stephens: The new management of what?

The Witness: The new management of Certain-teed, after Celotex had acquired an interest in the company.

Justice Stephens: I see.

By Mr. Knuff:

Q. And with whom in Certain-teed did you talk at that time? A. First with Mr. Henry J. Hartley, the president.

5306 Q. Where did you talk with Mr. Hartley? A. In their office in New York.

Q. And will you tell us the conversation? A. I told him that I was coming in to get acquainted, at the suggestion of Mr. Dahlberg—

Q. (Interposing) And who is Mr. Dahlberg? A. Mr. Dahlberg was president of the Celotex Corporation at that time.

Q. Proceed. A. And I stated that I wanted to discuss with him some matters with reference to the general situation in the gypsum industry.

He asked me to give him some overall picture of it, because he was new to the business, and would like to get an outsider's viewpoint.

I explained to him, as best I could, the overall situation in the industry with respect to the various companies, their size and influence in the industry, and so forth, and the problems of independents, and Cardiff in particular; and I went on to explain to him the situation with reference

to board and lath, and what it meant to an independent plaster manufacturer.

I then asked him as occasion would arise to inform himself a little better about these things we had been discussing, and asked him whether or not I might come in somewhat later and discuss with him more in detail the question
5307 of some dual arrangement between Certain-teed and Cardiff.

Q. What did you mean by "dual arrangement"? A. I meant an arrangement for them to sell us board and lath on the usual industry basis.

Q. What did Mr. Hartley say to you, if anything? A. Mr. Hartley told me that he was new to the business; that he was just beginning to learn something about it, and that he would welcome my return after a few months, and in the meantime would try to catch up on his information so that he could discuss the matter more intelligently.

Q. Did you subsequently go back and see Mr. Hartley? A. Yes sir, I did.

Q. When? A. I had a number of visits with him over a period of a year or so following the time he took over direction of the company.

Q. And what was the conversation that you had with Mr. Hartley? A. The conversations were that Cardiff Gypsum Company needed a good board and lath connection; that their plant at Fort Dodge would be a logical source of supply; that it would increase the outlets for the production of that plant, and therefore would be a good thing for both companies—and I asked him to enter into such an arrangement with us.

His reply was that they at that time had a number
5308 of matters under discussion with USG; that there were a number of differences about other things; and that as those got to some kind of a solution, he would be glad to take up our matter and try and arrange it for us.

Q. And did that end the second visit with Mr. Hartley? A. The second or third or fourth, or thereabouts.

Q. Did you subsequently see Mr. Hartley after the conversation that you have just related now? A. Yes, I did. It must have been a year or so after our first conversation. During that period, at his request, I had discussed the matter more in detail as to territory and freight rates and so on, with the vice president of the company, Mr. Albert Miller, I think it was, and with their sales manager, I forget his name.

Q. Would it be E. G. Roos? A. No sir.

Q. Would it be Warren Henley? A. He isn't the man that I have in mind at the moment. I did talk with Warren Henley about it during that period, though. It was Cres Stedman.

Q. Did you talk with Mr. Stedman? A. Yes sir, I did.

Q. What was the conversation that you had with Mr. Stedman? A. Mr. Stedman was in charge of the sales of the company—

5309 Mr. Bromley: (Interposing) May we have the time, please?

By Mr. Knuff:

Q. When was the conversation? Mr. Bromley wants to know. A. Well, all of these conversations were within the period of about a year after this new management took over, and my best recollection of that is that it was either late in 1938 or early in 1939, that the new management took over.

Q. Proceed. A. The conversations with Mr. Stedman and with Mr. Miller, who at that time was the vice president, were with regard to the details of the territory that we should serve, or did serve, with our sales organization—

Mr. Adams: (Interposing) Excuse me. Were these conversations with these gentlemen separately, or were they together when you talked with them? Could we have that indicated, please?

Justice Stephens: The Court understood that he was talking to these two men together, is that true?

The Witness: Generally, yes. I generally spoke to Mr. Stedman and Mr. Miller together, but almost always alone with Mr. Hartley, although sometimes with Mr. Miller. I don't remember ever talking with Mr. Hartley and Mr. Stedman together, however.

5310 We discussed the particular sales coverage that we had, that is where our salesmen operated, and what territories they covered; discussed some of the accounts that we handled, with the object in view of giving the facts to Mr. Stedman so that he could make some recommendation as to how much their business would be increased by such an arrangement.

By Mr. Knuff:

Q. What, if anything, did Mr. Stedman tell you, or Mr. Miller? A. They both told me very emphatically that they were in favor of such an arrangement.

Q. How many conversations did you have with Mr. Stedman and Mr. Miller, if you can recall? A. I would say, all in all, a dozen or so.

Q. A dozen or so? A. Yes sir.

Q. And was the substance of all these conversations the same as you have now related? A. That is right. During a part of the time Mr. Hartley felt that he couldn't press the matter because they had other things involved. Towards the end of that time, he assured me that he had pressed the matter with USG, and had discussed it with them, and had been turned down.

Q. How many conversations did you have with Mr. Hartley? A. About eight, I should say.

5311 Is my understanding correct that you had about 12 conversations with Stedman and Miller, and in addition to that, about eight conversations with Mr. Hartley—is that correct? A. That is right.

Justice Stephens: Over how long a period of time?

The Witness: Between a year and a year and a half, I should say.

By Mr. Knuff:

Q. You testified at the criminal trial in the District Court, did you not? A. I did.

Q. It is my recollection that you did not mention the conversations with Mr. Hartley or Mr. Stedman or Mr. Miller at that time. Can you tell us why? A. My recollection is that all the matter with respect to Certain-teed was excluded.

Q. I see. Did you talk with Mr.—

Mr. Bromley: (Interposing) Since he has gone into that, I think I ought to say that it was excluded by Judge Goldsborough because in that case we had a bill of particulars. Since there was a specific allegation in the indictment that one of the parts of the conspiracy was to refuse to sell Cardiff, we asked for a bill of particulars as to the refusals, the dates and the companies, and that bill

5312 of particulars did not include Certain-teed, and did not include others, as I remember.

Mr. Knuff: I just wanted to make it clear why there was none of this testimony given at the criminal trial. I hadn't finished doing that, but I thank Mr. Bromley for doing it. I intended to do it in that manner.

By Mr. Knuff:

Q. Did you have any conversations in 1938 with Mr. Warren Henley? A. Yes, I did.

Q. Where and when? A. Those were held in Chicago shortly after my first approach to the new Certain-teed management. Mr. Henley was one of the old-timers in the business, and knew the background, and Mr. Hartley naturally referred the matter to him for some opinion. Mr. Hartley told me that when I got back to Chicago I should see Warren Henley, and I did that.

Q. And what, if anything, did you say to Mr. Henley, and what, if anything, did Mr. Henley say to you? A. I asked Mr. Henley whether he would be in a position, or of a mind, to make a favorable recommendation on it, since they were looking very largely to his opinion on the matter. He told me that since this matter had been hanging fire, as far as he was concerned, for a period of five years or so then, and seeing the come-back that Cardiff had
5313 made after its reorganization, that he thought, on the whole, that he could recommend it.

Q. How many conversations did you have with Mr. Henley? A. Two or three.

Q. And was the substance of all the conversations similar to the one that you have just now related? A. Yes sir. He asked for some particulars from time to time about certain competitive situations, about certain sales here and there that he had heard about, and I gave him the information.

Q. Were you able to buy board from Certain-teed as a result of the visits that you had with Mr. Hartley, Mr. Stedman, Mr. Miller and Mr. Henley? A. We were not.

Q. Do you know Mr. Wright of the Texas Cement Plaster Company? A. Yes sir.

Q. Did you ever have any conversation with Mr. Wright concerning the purchase of board and lath at a discount, from Texas? A. Yes sir, I did.

Q. Where did you have that conversation? A. At a number of cities at which we used to meet, because we were both members of the Traffic Committee of the Gypsum Association.

5314 Q. When did you first contact Mr. Wright concerning the purchase of board and lath? A. Oh, about 1937 or 1938.

Q. In 1937 or 1938? A. Yes.

Q. Will you tell us the conversation that you had with him? A. It was a general conversation along the lines

that we wanted to have the sales of these products, and that I realized that it was not a very economical proposition, not very sound economically, to think about a connection with his company, because their plant was down in Texas, and the freight absorption to most of our customers would be great; in other words, the freight from his plant to our customers would be larger, on the average, than the freight from our plant to the same customers, who, of course, wouldn't pay any more for the product. So that it would be necessary, either for Texas or for ourselves to absorb the difference in freight, and that that would not make such an arrangement as economically sound as one with a plant in Fort Dodge, which of course was the indicated thing.

Nevertheless, I pointed out to him that it might fill in a gap in their production that was open, and as marginal business might be of some interest to him.

Q. Did you have any conversation with Mr. Wright
5315 as to your previous price policy on plaster? A. Yes.

Q. What was that conversation? A. Texas and ourselves are competitive in a rather narrow area, comprising Missouri, northern Oklahoma, and some of those states about half way between Fort Dodge and their plant in Texas. I discussed with him the competitive situation in a number of those places.

Q. I don't believe you answered the question that I asked you. I asked if you ever had any conversation as to your previous price policy. A. Yes sir, I discussed with him the background of this whole thing, which he said he knew. He had known Tom Breen, and had known the old Cardiff company and its policies, and he also knew about the change in management. I explained to him how we had been operating since 1935.

Q. Again, at the risk of being repetitious, when you say that you discussed the background, will you be a little bit more specific, please? A. That consisted largely in a complaint by USG and Certain-teed and National that in the old days, that is during the period of the Tom Breen management of the company—

Mr. Bromley: (Interposing) Is this what the witness told somebody, or isn't it?

By Mr. Knuff:

5316 Q. I am asking now as to your conversation with Mr. Wright. In the answer that you are making,

Mr. Sensibar, did you tell Mr. Wright what you are now telling us? A. In substance, yes.

Justice Stephens: Very well, proceed.

The Witness: (Continuing)—that the principal members of the industry used to object to our sales policy of selling directly to contractors, and jobbers, and so on, and since we had taken over the management of the company, and since the reorganization in 1935, that we were following the regular or normal, or customary sales practice of the industry in making sales almost exclusively through dealers.

By Mr. Knuff:

Q. This first conversation was had either in 1937 or 1938, is that right? A. That is right.

Q. And at that time did you ask Mr. Wright to have Texas apply to USG for permission to sell your company board and lath at a discount? A. I don't think I put it that way. I think I merely asked him whether we couldn't make an arrangement to buy from them.

Q. What did he say to you? A. He said that that would depend, in the last analysis, on USG; that he would
5317 first have to talk to his people, that is to Mr. Chism and Mr. Gloyd, and then it would depend on whether USG would give him permission.

Q. Did you talk to Mr. Wright after that? A. A number of times, yes.

Q. And with reference to your first conversation, when next did you see Mr. Wright? A. We used to see each other every three or four months at these Traffic Committee meetings.

Q. And how many conversations would you say that you had with Mr. Wright? A. Seven or eight. I kept the thing alive every time we were together, which was over a period of a couple of years.

Q. That is, from 1937 down to 1939 or 1940—was it as late as 1940? A. It may be.

Q. What is your best recollection as to that? A. Either late in 1939 or early in 1940, it was about two years. He finally told me that while they hadn't made any firm application, that they had talked the thing over and that there just wasn't any use.

Q. Did he say who he had talked it over with? A. With USG.

Q. And Mr. Wright told you that? A. Yes sir.

Q. When did he tell you that? A. Well, as I have
5318 said, as nearly as I can tell, either in the fall of 1939 or the spring of 1940.

Q. Did you ever have any conversation with any other person connected with Texas Cement Plaster Company than Mr. Wright? A. Not on that subject, no sir.

Q. I show you what has been marked for identification as Government's Exhibit 579, the same being a letter, dated September 22, 1939, addressed to Mr. Baker of the National Gypsum Company and signed by Ezra Sensibar.

(The document referred to was marked as Government's Exhibit No. 579 for identification.)

(Government's Exhibit No. 579 for identification was handed to the witness.)

By Mr. Knuff:

Q. Is that your signature, Mr. Sensibar? A. Yes, it is.

Justice Stephens: Does that consist of two pages, or one?

Mr. Knuff: It is a one-page letter, your Honor.

Justice Stephens: You are skipping one item, then, in our sets?

Mr. Knuff: Yes, your Honor, I am skipping one item.

By Mr. Knuff:

5319 Q. I also show you what was been marked for identification as Government's Exhibit 580, the same being a copy of a letter from the National Gypsum Company, addressed to Mr. Ezra Sensibar, and signed John C. Best, Vice President.

(The document referred to was marked as Government's Exhibit No. 580 for Identification.)

(Government's Exhibit No. 580 for Identification was handed to the witness.)

By Mr. Knuff:

Q. Did you receive the original of that letter?

Mr. Finck: What is the date of that?

Mr. Knuff: September 27, 1939.

By Mr. Knuff:

Q. Did you receive the original of that letter, Mr. Sensibar? A. Yes, I did.

Justice Stephens: You haven't offered Exhibit No. 579, have you?

Mr. Knuff: No, I have not.

Justice Stephens: Is Exhibit 580 in response to Exhibit 579?

Mr. Knuff: I am going to have three of them marked, and then I will interrogate the witness.

Justice Stephens: I see.

5320 By Mr. Knuff:

Q. I show you what has been marked for identification as Government's Exhibit 581, the same being a copy of a letter dated October 3, 1939, addressed to Mr. John C. Best, and signed, "Cardiff Gypsum Company, by E. S., President."

(The document referred to was marked as Government's Exhibit No. 581 for identification.)

(Government's Exhibit No. 581 for identification was handed to the witness.)

By Mr. Knuff:

Q. Are those your initials on that carbon? A. Yes.

Q. Was the original of that letter sent to Mr. Best? A. It was.

Q. I show you what has been marked for identification Government's Exhibit 582, the same being a copy of a letter dated October 7, 1939, addressed to Mr. Ezra Sensibar, and signed National Gypsum Company, John C. Best, Vice President.

(The document referred to was marked as Government's Exhibit No. 582 for identification.)

(Government's Exhibit No. 582 for identification was handed to the witness.)

By Mr. Knuff:

5321 Q. Did you receive the original of that letter, Mr. Sensibar?

Mr. Finck: What date is that?

Mr. Knuff: October 7, 1939.

By Mr. Knuff:

Q. Did you receive the original of that letter? A. I did.

Q. Would you look at Government's Exhibits Nos. 580 and 582, please?

Justice Stephens: Let the Court take time to read these so that we can tell what this is about.

By Mr. Knuff:

Q. You will notice, Mr. Sensibar, that those are copies of originals. Do you know where the originals are? A. No, I do not.

Q. Have you made an effort to locate them? A. I have, yes sir.

Q. Would you say that the Exhibit marked 580 for identification is a correct copy of the letter that you received? A. Yes, it is.

Q. And would you say that the exhibit marked for identification No. 582 is a true and correct copy of the letter that you received? A. Yes sir.

5322 Q. And you have made an effort to find both of the originals? A. Yes, I have.

Q. And you did that pursuant to a letter that I wrote to you, is that correct? A. That is correct.

Mr. Knuff: We offer in evidence, if your Honor pleases, Government's Exhibits 579, 580, 581 and 582.

Justice Stephens: Let the Court read them.

Now, Mr. Knuff, does one of these letters appear to be an answer to the letter of September 22, Exhibit 579, and if so, which one?

By Mr. Knuff:

Q. Will you tell us, Mr. Sensibar, if any of the letters that you have in front of you is an answer to the letter marked Exhibit 579 for identification, please? A. Yes sir.

Justice Stephens: Which one?

The Witness: The letter of September 27, which is marked Exhibit 580.

Justice Stephens: Is there any objection to these?

Mr. Bromley: May it please the Court, we object to these Exhibits 579 to 582 inclusive, as immaterial to any charge in the complaint. They have to do, if they have to do with anything, with resales by Cardiff of Keene's cement.

5323 Now, there is no claim of any kind in the pleadings about the resale prices of plaster or Keene's cement. Keene's cement is mentioned in the bill of particulars as one of the three miscellaneous gypsum products covered by the suit, but there is no claim of any kind about the resale prices of plaster or any miscellaneous gypsum products.

The rule applied, therefore, last Monday, with respect to the testimony of the witness Perry as to resales by a wholesale distributor, should be applied here.

Justice Stephens: We understood this witness as being called under the charge in Paragraph 45 (c), which concerns concertedly raising, maintaining and stabilizing the general level of prices for plaster and miscellaneous gypsum products manufactured and sold by said companies in the Eastern Area—and that the theory of this testimony was that the United States Gypsum Company and the other defendants wouldn't sell to Cardiff because Cardiff wouldn't keep the price of plaster up, that is, they wouldn't sell board to Cardiff.

Now these letters, it is urged, have to do with the resale price of Keene's cement.

What is your answer to the objection?

Mr. Knuff: My answer to the objection, your Honor, is of course that Keene's cement is a plaster, and that it is mentioned—

Justice Stephens: (Interposing) That is not disputed, the question is concerning resale price.

5324

Mr. Knuff: My offer is not to establish the resale price, but to show that there was a fixing of the plaster prices.

Mr. Bromley: It seems to me that counsel overlooks the fact that up until the subject matter of these letters was approached by him, he had been talking or inquiring about plaster manufactured by the Cardiff Gypsum Company. Now, these letters have something to do, not with anything manufactured by them, but with something which they are trying to buy from the National Gypsum Company, because they don't make it themselves. Therefore his whole approach here has shifted from Paragraph 45 (c) to a charge of resale price fixing of miscellaneous gypsum products, which is not charged in the complaint.

Mr. Knuff: May I refer your Honor to Exhibit No. 581, paragraph 3, which is a letter from Mr. Sensibar to Mr. Best, in which Mr. Sensibar says:

"Your other possible objection might have arisen from a matter which you once asked me to investigate, the alleged sale of some of your Keene's cement at a price below cost. I investigated the quotation and found that through an error it had indeed been made below cost. The Cardiff Gypsum Plaster Company accordingly withdrew it, and the sale was never made."

Now, if your Honor will keep that in mind and then read Government's Exhibit No. 582, in which Mr. Best says:

5325 "I acknowledge letter of the 3rd, and the matters that you mention naturally had a considerable bearing on our decision."

We are not offering these letters to prove the resale price of Keane's cement, but we are offering them as a circumstance from which the Court can infer that National was interested in maintaining plaster prices.

They are not offered for the purpose of proving the truth of the sale below cost of Keane's cement, but purely circumstantially, from which it can be inferred that this evidence, in connection with the other testimony that Mr. Sensibar has given, establishes the fact that the defendants in this case, particularly the defendant National, had in mind a stable price for plaster.

Mr. Brownley: Now, if counsel, in Exhibit No. 581, had read on to the fourth paragraph, he would there have disclosed that the letter characterizes the transaction described in the third paragraph as a "resale price". The last sentence of the fourth paragraph says:

"As to the question of our resale price, we would be entirely willing to verify our present statement by audit."

The instance which is being talked about in the third paragraph is a resale instance. Cardiff bought the Keene's cement from National and resold it.

5326 Justice Stephens: The objection to these exhibits is sustained on the ground that they apparently relate to resale prices of Keene's cement, and that is not covered by any charge in the complaint. They are not received in evidence.

By Mr. Knuff:

Q. I would like to have marked for identification as Government's Exhibit No. 583 a memorandum from Mr. Burley to Mr. Baker, dated September 25, 195[illegible].

(The document referred to was marked as Government's Exhibit No. 583 for identification.)

(Government's Exhibit No. 583 for identification was handed to the witness.)

Justice Stephens: Where is that in this file?

Mr. Knuff: It should follow, your Honor, Exhibit No. 579.

Justice Jackson: It is right ahead of 579.

Mr. Knuff: As I say, in connection with this exhibit, this was furnished to us by the National Gypsum Company under a subpoena served upon them, and apropos of that, I want to call your Honor's attention, on the question of identification, to the position taken by the defendants at page 5334 of the record, beginning with line 12—

Justice Stephens: (Interposing) That was yesterday's record?

Mr. Knuff: Wednesday's, your Honor, just before
5327 the recess on Wednesday.

Justice Stephens: I missed one statement you made. You said that this was supplied from the files of National?

Mr. Knuff: That is right, your Honor.

Justice Stephens: Under subpoena by the Government?

Mr. Knuff: Yes.

Justice Stephens: The Court does not have that record before it. Will you hand it to the Marshal so that the Court may see it?

(A copy of the transcript referred to was handed to the Court.)

Mr. Knuff: I gave your Honor the wrong reference, I am sorry. It should be page 5335, line 14.

Justice Stephens: Very well. Is this exhibit offered?

Mr. Knuff: Yes, your Honor.

Justice Stephens: Let the Court read it.

Is there any objection?

Mr. Bromley: I object to it on the ground that there is no proper foundation, and that it is incompetent. In connection with my statement on page 5335 of the record, not only is it probably inaccurate, but what I had in mind was that this Court had been ruling that where a document had been identified and was produced from the files of a defendant, that that was some authentication for it. This document has not been identified, as I understand it, so
5328 that all we have here, if we have anything, is a document which counsel says was produced by National under subpoena.

So far as its materiality is concerned, I object to it only on the usual ground.

Mr. Knuff: I don't think that Mr. Finck will say that he didn't furnish this exhibit 583 to us. You furnished that to us, did you not?

Mr. Finck: Of course I did.

Mr. Knuff: It was taken from the files of National?

Mr. Finck: It must have been. I submitted it some time ago. I don't recall that one particularly. There is a number on the back of it which is the number that was put on by our office at the time it was submitted.

Mr. Bromley: That is certainly not a sufficient identification.

Justice Stephens: The problem seems to be this, Mr. Knuff. The situations we have had before were situations where a letter, being on its face addressed to a defendant, and then found in its files, and the signature having been identified, the Court ruled that there was, thereby, a circumstantial identification, or rather circumstantial proof of its having been received. But the question apparently raised by Mr. Bromley here is that the mere fact that a memorandum is found in the file of a defendant, or is furnished from the file of a defendant as having been there, without any testimony that it was written by a per-
5329 son connected with the company, doesn't bind the company.

Is that your point, Mr. Bromley?

Mr. Bromley: Yes, your Honor.

Mr. Knuff: I realize what your Honor's previous rulings were, and I felt that Mr. Bromley was shifting, and I just wanted to call your Honor's attention to the matters that appeared there—

Justice Stephens: (Interposing) It is entirely proper for you to call attention to anything that Mr. Bromley has said.

I think, however, that there we were considering a different situation. Now this, I think, is the first time we have had presented to us the question of whether or not the mere existence in the file of a party, of a paper containing apparently relevant—we will assume that for the purpose of argument—material, is sufficient to warrant its coming into evidence without any showing that it was prepared by somebody who had any authority to bind the company.

We will hear you on that if you wish to be heard.

Mr. Knuff: Well, I don't want to labor the argument, but there is no question here that Mr. Burley was the Vice President of the National Gypsum Company; there is likewise no question but what Mr. Baker was the President of National Gypsum Company.

When we send out our subpoenas and ask for cer-
5330 tain correspondence, and that correspondence is furnished to us, in response to that subpoena, it seems

to me that the position that Mr. Bromley took the other day is the correct and sound position, that they are almost estopped, if your Honor pleases, to question the authentication of that, because they have said, "We have before us your subpoena; we are giving you this in answer to it; it is from our files."

Justice Stephens: Well, Mr. Knuff, the problem that troubles me, at least, is this. If you could show to the Court that you had served a subpoena upon the defendants asking them to produce a communication in their files between Burley and Baker, and they then had produced this, I should think that your situation might be a little bit different. But that isn't what the record shows. The record simply shows that you filed a general subpoena for the production of various documents, and I have some doubt as to whether there is a sufficient foundation for this.

Mr. Knuff: Our subpoenas asked for all interoffice communications as a general rule, your Honor. I will be glad, during the lunch hour, to get the subpoena that was served upon them.

Justice Stephens: I think that might be material; perhaps you had better do that.

We will take the luncheon recess at this time.

(Whereupon a recess was taken from 12:10 p.m. until 1:45 p.m.)

5331 AFTERNOON SESSION

(The trial was resumed at 1:45 o'clock p.m., pursuant to recess.)

Justice Stephens: Have you anything further to say with respect to this proposed exhibit?

Mr. Knuff: Yes, Your Honor.

During the lunch hour I sent over to the Department and obtained the original subpoena duces tecum which was served upon the National Gypsum Company on February 17, 1940. The subpoena is in the usual form that has been sustained, time after time, on motions to quash. In paragraph 22 of the subpoena, we asked for the following:

"All original memoranda, reports, and intra-company communications—or copies thereof, where the originals can not be produced—made or written by you, or by any of your subsidiaries, during the period from January 1, 1929, to the date of this subpoena; and all original communications—or copies thereof, where the originals can not be produced—

between you, or between any of your subsidiaries, and any producer or distributor of gypsum products, during the period from January 1, 1929, to the date of this subpoena, referring or relating to the sale of gypsum products, or the refusal to sell gypsum products, by you or by any of your subsidiaries, to Fairmont Wall Plaster Company, Cardiff Gypsum Company, and Gypsum Products Company."

5332 Now we have asked for the inter-office memoranda. National Gypsum Company, pursuant to that subpoena, and pursuant to the various requests contained therein, furnished us Government's Exhibit 583. In effect, the National Gypsum Company said, "We have gone over the matters which you have requested in your subpoena, and here are the documents which we believe relate to what you have asked for."

In addition to that, however, we have the testimony of Mr. Sensibar to the effect that he had contacted Mr. Baker sometime between 1936 and 1938; that Mr. Baker had told him to see Mr. Harrison, the Sales Manager; that he did see Mr. Harrison, had a talk with Mr. Harrison, on one occasion or maybe more, I don't recall how many, now; and the exhibit, Government's Exhibit 583 for Identification, ties the conversation of Mr. Harrison and Mr. Sensibar together.

Now at this time, Government's Exhibit 583 for Identification is meaningless unless it is related to a sale of gypsum products. It wasn't any academic question with National as to the policies of Cardiff. It must have had relation to—and I think we can assume that it did, as reasonable persons—the sale of gypsum products.

We say that in view of what we have asked for in our subpoena, from the National Gypsum Company, the inter-office memoranda, and what they furnished us, taken together with what Mr. Sensibar testified to here this

5333 morning, it is at least prima facie evidence of the genuineness of it. We don't say that it is conclusive, but it relates to the very subject that Mr. Sensibar has testified concerning this morning.

Justice Stephens: Please hand that paragraph of the subpoena to the Marshal so that the Court may see it.

(Subpoena handed to the Court.)

Mr. Knuff: It is paragraph 22, Your Honor.

Justice Stephens: What is the date of the subpoena?

Mr. Knuff: It was served on either the 14th or the 17th of February, 1940.

If your Honor will turn to the Marshal's return, you will get the exact date there. It was either the 14th or the 17th of February, 1940.

Justice Stephens: Do you wish to be heard further, Mr. Finck?

Mr. Finck: Yes, Your Honor.

I haven't looked at the original subpoena for some time, but I doubt very much if this was returned under the paragraph that was just read. There are a great many other provisions in the subpoena; and, of course, the time that we had, to go over 15 years of work and files, was very short, so that we really returned almost everything that had any indication that it was connected with sales of gypsum board and gypsum lath and plaster, and everything else.

Now we did not have time, when we were collecting
5334 this material, to have our officers authenticate these documents and pass upon them.

It seems to me that if a ruling allowing all of this evidence just to be thrown in, were made, it would open the door to allowing the Government to not produce the real facts, but to put in all sorts of evidence here from which the wrong inferences could be taken.

Justice Stephens: How much of this type of evidence do you propose to offer, Mr. Knuff?

Mr. Knuff: Offhand, I can't think of another one except this one.

Justice Stephens: I was about to say that—

Mr. Knuff: (Interposing) I wouldn't want to be bound by that.

Justice Stephens: I was about to say that apparently the only thing in this exhibit that appears, from our present inspection of it, to have any relationship to the issue we are now discussing, is the first sentence of the second paragraph.

Mr. Knuff: That is correct, Your Honor.

Justice Stephens: And that sentence, embodying a claim or purported claim by National as to price cutting by Cardiff, has been proved to be the claim of several of the defendant companies, by this witness, before. It would seem almost repetitive and hardly worth the time we are
5335 spending on it, except for this,—that of course, we don't want to make a ruling which would establish a precedent for introducing a large class of evidence, or for rejecting it, unless we are thoroughly advised as to the propriety of the ruling.

The Marshal will hand this subpoena to Mr. Finck.

(The subpoena was handed to Mr. Finck.)

Mr. Finck: If the Court please, in reading over the exhibit, I hardly see how the contents of the exhibit tie into any of the evidence given by the witness, or to the other exhibits which the Government has tried to introduce here. It is just a very general statement as to certain correspondence, which I do not have, attached to this exhibit.

Justice Stephens: That goes to its relevance, Mr. Finck. Let's get first past the question of its proper identification.

Mr. Bromley: May it please the Court, I am interested not in the exhibit, but in the principle, and I try to test it by our every-day experience in court. If I could serve a subpoena duces tecum on the plaintiff and have a messenger boy bring the documents called for by the subpoena, and then proceed to offer them in evidence, without any witness on the stand, I would be doing something that I never heard of being done in 20 years. Certainly, if I get a subpoena duces tecum returned from the Bethlehem Steel Company, and I get all their files relating to a certain subject,
5336 I wouldn't think I had any right to put them in evidence until I put a witness on the stand and asked him what they were. A return under a subpoena is no verification of anything except they seem on their face to have some relation to what is demanded in the subpoena.

Justice Stephens: Is Mr. Burley or Mr. Baker living?

Mr. Finck: Both of them are living.

Mr. Knuff: I don't know whether this has any bearing or not, but it was offered in the criminal case, and admitted in the criminal case.

Mr. Bromley: With a witness on the stand.

Mr. Knuff: No, Your Honor. Mr. Burley couldn't be called to the stand because Mr. Burley was a defendant in the criminal case.

Mr. Bromley: There were other witnesses from the company on the stand, and there was a long fight about identifying this document, as I remember it, with witnesses on the stand testifying about it.

Justice Jackson: Witnesses from National?

Mr. Bromley: Yes.

Mr. Knuff: That isn't my recollection.

Justice Stephens: Well, it is my personal view that it would not be a sound ruling, to establish that evidence can be introduced in this manner, especially in view of the fact

that the witnesses are available to qualify the docu-
5337 ment, and my own view is that it is not admissible because of lack of identification.

What is your view?

Justice Garrett: I agree with that.

Justice Jackson: So do I.

Justice Stephens: That is the view of all three of us.

The offer of the exhibit is rejected, with leave to re-offer it if you can produce someone to identify it.

Mr. Knuff: Mr. Sensibar, will you resume the stand?

Thereupon, EZRA SENSIBAR, the witness on the stand at the time of recess, resumed his testimony as follows:

Direct Examination (resumed)

By Mr. Knuff:

Q. Mr. Sensibar, in 1939, did you endeavor, or did your company endeavor, to purchase gypsum board and lath from the Ebsary Gypsum Company? A. Yes, sir, we did.

Q. Who conducted the negotiations for Cardiff? A. I started them, and had a number of conferences on the subject, and our Sales Manager, Mr. M. S. Gutman, then entered into the situation with respect to a good many of the details of the territories.

Q. What person or persons from Ebsary Gypsum Company did you contact? A. Mr. Fred Ebsary and
5338 Mr. Lenci.

Q. And can you tell us about when you contacted them? A. It was right after we learned that they had been interested in securing a wallboard order in Chicago.

Q. Can you fix the month? A. No, sir, I can't.

Q. I show you what has been marked for Identification as Government's Exhibit 584.

(The document referred to was marked as Government's Exhibit No. 584 for Identification.)

By Mr. Knuff:

Q. Will you look at that exhibit and see if you recognize it, please?

(Government's Exhibit No. 584 for Identification handed to the witness.)

By Mr. Knuff:

Q. That is dated October 4, 1939, addressed to George Lenci, and is signed by the Cardiff Gypsum Company. A. Yes, I remember this letter.

Justice Stephens: Was it marked in the previous trial Exhibit 140?

Mr. Knuff: Yes, Your Honor, that is the one.

Justice Stephens: Thank you. Let us read it, now.

(Government's Exhibit 584 for Identification examined by the Court.)

5339

Justice Stephens: Very well, proceed.

By Mr. Knuff:

Q. Since looking at that exhibit, Mr. Sensibar, does that refresh your recollection as to the date when you had a conference with the Ebsary Gypsum Company? A. Yes, sir.

Q. Would you say it was on or about September or October? A. Yes, I would.

Q. Of 1939? A. Yes. Very likely September, because this was written after my first or second conference with Mr. Ebsary.

Q. Will you just relate the substance of any conferences that you had with Mr. Ebsary, or Mr. Lenci—what you said to them and what they said to you? A. As I said before, this began shortly after—

Mr. Bromley: (Interposing) I object to these preliminaries. Can't we get to the conversation, if the Court please.

Justice Stephens: Just state the conversation, if you can, unless it is necessary to an understanding of the conversation that you state some preliminary matter; if so that can be stated, and we will consider, after hearing it, whether it should stay in.

5340

The Witness: I explained to Mr. Ebsary that the reason for my visit to him was that we had learned of his interest in some wallboard business in Chicago; and that that raised the possibility in our minds that we might be able to make a deal, of mutual benefit, for that whole territory. I then discussed with him the sales territory that we covered, pointing out the extent of the coverage in each part of the territory, and went over with him in a general way what the freight rate situation would be.

He expressed an interest in it, and suggested that on my way back to Fort Dodge, I stop to see their plant near Rochester, and have a talk with some of their people there about the operating situation; and then, that we give him more detailed freight rate information so that we could then follow it up with a more detailed discussion.

By Mr. Knuff:

Q. Now, in your conference with Mr. Ebsary, were the price policies of the Cardiff Gypsum Company, concerning plaster, mentioned? A. I have no recollection that they were.

Q. Now, then, will you continue with what you were going to say when I interrupted you, that on your way back you were to stop at Rochester? A. Yes. I did stop at the plant on my way back, and looked at the plant and talked
5341 with the superintendent there, and was told that—

Q. (Interposing) I am not interested in what the plant superintendent told you. Did you talk with Mr. Lenci? A. Yes, sir.

Q. When? A. I think on my next visit.

Q. And when was that? A. Several weeks after that.

Q. And what conversation did you have with Mr. Lenci? A. I had with me then a list of rates, of freight rates, from their plant near Rochester to principal points in our territory, and also the freight rates from our plant, so that we could see what the amount of absorption would be that would have to be made, either by themselves or by us, in order to take care of the trade in those territories.

We went over those in detail to arrive at what average price or yield the Ebsary Company would have out of sales that they would make to us and ship to our various customers in our territory.

Q. How many conversations did you have with Mr. Lenci? A. Three or four.

Q. And what you are relating now is the subject matter of the first conversation, or have you related all of it? A. Yes, I think of the first conversation, because the matter was covered more in detail afterwards, between
5342 Mr. Lenci and our Sales Manager.

Now, did you secure an order for gypsum board and lath, and forward that order to the Ebsary Gypsum Company? A. Yes, we did.

Q. When? A. Shortly after these September or October conversations.

Q. Was that order ever filled by the Ebsary Gypsum Company? A. No, sir, it was not.

Q. In any of your conversations that you had with either Mr. Lenci or Mr. Ebsary, was the subject of your price policies on plaster ever discussed? A. I think not.

Q. You think not? A. That is right.

Q. I show you what has been marked for Identification as Government's Exhibit 585, the same being a letter dated October 5, 1939, addressed to the Cardiff Gypsum Company and signed Ebsary Gypsum Company—

Mr. Bromley: Before that exhibit is identified, I now move to strike out all the testimony having to do with Ebsary and Cardiff, as well as the testimony of the witness Lenci and the exhibits with respect to it.

Justice Stephens: Will you repeat that, Mr. Reporter?

5343 (The record was read by the reporter.)

Justice Stephens: Do you mean the testimony of the Witness Lenci?

Mr. Bromley: Yes, I was joining up, in that motion, a motion with respect to this witness' testimony and the testimony of Lenci regarding the same subject matter.

Justice Jackson: For the reason that?

Mr. Bromley: For the reason that this witness has testified that there was no mention made of Cardiff's price policies on plaster, which, as I understand it, is the only purpose of the testimony.

Mr. Knuff: Your Honor will recall Mr. Lenci's testimony to the effect that he knew the reputation of the Cardiff Gypsum Company, and when asked what that reputation was, he said they had the reputation of being a price cutter. That is Mr. Lenci's testimony.

Justice Jackson: But this witness states that they didn't discuss anything about price policies on plaster.

Mr. Knuff: That is right.

Justice Jackson: Why shouldn't that be stricken, anyhow, regardless of what Lenci said?

Mr. Knuff: So far as striking that answer, I don't care.

Mr. Bromley: I am not moving that that alone be stricken.

Justice Jackson: I was getting at them one at a time.

Mr. Bromley: My friend makes it too easy, he
5344 wants to just strike out that answer. I moved to strike out Lenci's testimony, also.

Justice Jackson: We can't recall all of Lenci's testimony.

Justice Stephens: Mr. Bromley, it seems to me that the testimony of this witness, and the testimony of Mr. Lenci, ought to stand, notwithstanding the fact that this witness said he didn't talk to Lenci about price cutting, or the alleged price cutting policy of Cardiff, because Lenci did

testify, as I remember it, that he knew something of the reputation of this company for price cutting, that is, Cardiff, and it may be that in connection with other letters and other evidence it can be shown circumstantially that there is some basis for inferring that the refusal of Ebsary to sell board was on that account, or the refusal of USG to permit Ebsary to sell board was on that account.

What do you say to that?

Mr. Bromley: I am frank to say I don't understand the whole theory of the evidence. As I remember Mr. Lenci's testimony, he said he was ready, willing and anxious to sell this company, and he tried his best to get a consent to sell the company, and the letters certainly bear out that testimony.

Justice Stephens: There is no doubt about that.

Mr. Bromley: The testimony is that he wrote a
5345 letter to us, and we, in the exercise of our right under our license, sent him a telegram and said "Permission is refused". Now what in the world that has got to do with the maintenance of plaster prices, I can not for the life of me see.

Justice Stephens: What do you say to that, Mr. Knuff?

Mr. Knuff: I still think that the evidence should not be stricken from the record, because whether the Ebsary Gypsum Company was willing to sell, knowing the reputation, does not seem to answer the question completely at all. The refusal of USG is still a matter for consideration here, and it is a fact that USG likewise knew what the reputation of the Cardiff Gypsum Company was.

Mr. Bromley: Is it the contention of counsel that USG had no right to refuse to give consent, under its license, for any or no reason? Didn't we have an absolute right to refuse, under our license, to give a consent, whether we had any reason or not? If we didn't like the color of the man's hair, we could refuse. We didn't have to give a consent to licensees to sell to this class of trade, because we put a clause in our contract that said, "You licensees can't sell to manufacturing distributors at all without our consent".

Justice Stephens: Well, we have been receiving this testimony only under the theory, in paragraph 45(c) of the complaint, that it might have some tendency to prove that
5346 there was an attempt to keep up the prices on plaster by refusing to sell to those who were supposed to be cutting the price. That is the only theory on which it is being received.

We deny the motion to strike.

By Mr. Knuff:

Q. I show you, Mr. Sensibar, what has been marked for Identification as Government's Exhibit No. 586, the same being a letter dated October 13, 1939, addressed to the Cardiff Gypsum Company, and signed George N. Lenci.

(The document referred to was marked as Government's Exhibit No. 586 for Identification.)

(Government's Exhibit No. 586 for Identification was handed to the witness.)

By Mr. Knuff:

Q. Will you state whether or not that letter was received at the office of the Cardiff Gypsum Company?

Justice Stephens: What is the date of that letter?

Mr. Knuff: October 13, 1939, Your Honor.

The Witness: It was.

Mr. Bromley: Where is Exhibit 585? I have no record of that.

Justice Jackson: It is the letter of October 5, 1939.

By Mr. Knuff:

Q. I now show you, Mr. Sensibar, what has been marked for Identification as Government's Exhibit 587, the
5347 same being a letter, or rather a carbon copy of a letter, dated October 14, 1939, addressed to Mr. George Lenci, and signed Cardiff Gypsum Company.

(The document referred to was marked as Government's Exhibit No. 587 for Identification.)

(Government's Exhibit No. 587 for Identification was handed to the witness.)

By Mr. Knuff:

Q. Can you state whether the original of that letter was sent? A. It was.

Q. I show you what has been marked for Identification as Government's Exhibit 588—

Justice Stephens: (Interposing) Just a minute, let us read these as we go along.

Mr. Knuff: Pardon me.

(Government's Exhibit No. 587 for Identification was examined by the Court.)

Justice Stephens: Proceed.

By Mr. Knuff:

Q. Government's Exhibit 588 for Identification is a letter dated October 16, 1939, addressed to the Cardiff Gypsum Company and signed George N. Lenci. Will you state whether that letter was received?

5348 (The document referred to was marked as Government's Exhibit No. 588 for Identification.)

(Government's Exhibit No. 588 for Identification was handed to the witness.)

The Witness: Yes, sir, it was.

By Mr. Knuff:

Q. I likewise show you what has been marked for Identification as Government's Exhibit 589, the same being a letter dated October 21, 1939, addressed to the Cardiff Gypsum Company and signed Ebsary Gypsum Company.

(The document referred to was marked as Government's Exhibit No. 589 for Identification.)

(Government's Exhibit No. 589 for Identification was handed to the witness.)

By Mr. Knuff:

Q. Was that letter received by your company, sir? A. Yes, sir, it was.

Q. I show you what has been marked for Identification as Government's Exhibit 590, the same being a telegram dated October 25, 1939, addressed to the Cardiff Gypsum Company, and signed Ebsary Gypsum Company.

(The document referred to was marked as Govern-
5349 ment's Exhibit No. 590 for Identification.)

(Government's Exhibit No. 590 for Identification was handed to the witness.)

By Mr. Knuff:

Q. Was that telegram received, Mr. Sensibar? A. Yes, sir, it was.

Mr. Knuff: I now offer in evidence Government's Exhibits Nos. 584, 585, 586, 587, 588, 589, and 590.

Justice Stephens: Is there any objection as to identification?

Mr. Bromley: May I have a moment to look at them, please?

Justice Stephens: Yes, you may.

(Exhibits examined by counsel.)

Mr. Bromley: May it please the Court, as to Exhibit 585, we make the usual objection; and also object because it is immaterial to any issue in this case.

Justice Stephens: That objection is overruled, and the exhibit is received subject to the usual reservation with respect to declarations of alleged co-conspirators.

Mr. Knuff: I don't want to lead the Court into error on Exhibit 585. Mr. Steffen and the Reporter have called my attention to the fact that Mr. Sensibar has not as yet identified Exhibit 585.

Justice Stephens: Suppose you ask him to do that, if he can.

5350 (The document referred to was marked as Government's Exhibit No. 585 for Identification.)

By Mr. Knuff:

Q. Mr. Sensibar, was Exhibit 585 received by your company? A. Yes, sir, it was.

Justice Stephens: Is any question raised as to its having been sent by Mr. Hough or signed by Mr. Hough? Who is representing Ebsary today?

Mr. Finck: Mr. Varian is not here, Your Honor.

Mr. Bromley: I think no question is raised about Mr. Hough's signature.

Justice Stephens: Very well; that exhibit, then, is received, subject to the usual reservation with respect to declarations of alleged co-conspirators; and the objection as to materiality is overruled.

(The document referred to, marked as Government's Exhibit No. 585, was received in evidence.)

Justice Stephens: Are there any other objections?

Mr. Bromley: As to the rest of the exhibits, Nos. 586 to 590, inclusive—

Justice Jackson: (Interposing) How about Exhibit 584?

Mr. Bromley: That wasn't offered.

5351 Mr. Knuff: If I didn't offer it, I meant to offer it. I meant to offer 584 to 590, inclusive.

Justice Stephens: It occurs to the Court that possibly this whole matter could be covered by a stipulation. Apparently all the letters tend to prove, that is, subject to your objection as to the materiality of the evidence, is that the Cardiff Gypsum Company applied to Ebsary for purchases of board to fill its orders, and that Ebsary tried to get the consent of USG, which was refused. That has all been shown before, anyway, by Mr. Lenci.

Mr. Bromley: I offered to stipulate that before, but we couldn't agree on it.

Mr. Knuff: As I say, if the Court cares to not receive these in evidence—

Justice Stephens: (Interposing) We are perfectly willing to receive them if they are properly introducible. I simply made that suggestion in the interest of time. It takes a lot of time to identify the exhibits and to consider the objections on them. If they could be covered by a stipulation, it would be proper; but if there is something in them that you think the Government needs to prove, we don't wish to interfere with your proper efforts to prove it.

Mr. Knuff: I don't think there is anything in these that the Government needs to prove that hasn't already been proved by the exhibits introduced through Mr.
5352 Lenci. They simply round out that picture, supplying the missing letters in the Lenci testimony.

Justice Stephens: How about Exhibit 584?

Mr. Bromley: I make the usual objection, and object on the ground that it is immaterial to any charge in the complaint.

Justice Stephens: Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 584, was received in evidence.)

Justice Stephens: How about Exhibit 586?

Mr. Bromley: As to the rest of the exhibits, 586 to 590, inclusive, they not only round out the picture, but they are repetitious, because every one of them has heretofore been introduced and received in evidence.

Justice Jackson: Those very documents?

Mr. Bromley: Every one of them.

Mr. Knuff: If that is the fact, then I don't want them in evidence.

Mr. Bromley: Government's Exhibit for Identification 586 is already in evidence in this case as Government's Exhibit 536.

Justice Stephens: And has 587 been offered again?

5353 Mr. Bromley: I am talking about 586.

Justice Stephens: How about Exhibit 587?

Mr. Bromley: That is already in evidence in this case as Exhibit 537.

Justice Stephens: Exhibit 588?

Mr. Bromley: Already in evidence in this case as Exhibit 539.

Justice Stephens: Exhibit 589?

Mr. Bromley: Already in evidence in this case as Exhibit 541.

Justice Stephens: Exhibit 590?

Mr. Bromley: Already in evidence in this case as Exhibit 543.

Justice Stephens: Is there any dispute about that, Mr. Knuff?

Mr. Knuff: I haven't checked it, and if Mr. Bromley says that that is the fact, I would be inclined to take his word for it.

Justice Stephens: Then we will reject those exhibits last mentioned, commencing with 586 and concluding with 590, on the ground that they are repetitive.

Mr. Knuff: The exhibits themselves I don't believe are in; I don't believe that these identical exhibits are in. But there are carbon copies in, which is practically the same thing, and I am not going to insist at all.

5354 Justice Stephens: Very well.

By Mr. Knuff:

Q. Mr. Sensibar, have you told us about all the conversations that you have had with members of the industry with relation to your attempts to purchase gypsum board and gypsum lath at a discount? Are there any other companies, who are defendants here today, that you talked to, that you haven't already testified concerning? A. To the best of my knowledge, that is all.

Q. I want to call your attention—

Justice Stephens: (Interposing) Just a minute, Mr. Knuff.

(The Justices conferred.)

Justice Stephens: Proceed.

By Mr. Knuff:

Q. I want to call your attention, Mr. Sensibar, to page 5543 of the transcript, beginning at line 7, where I asked you this question:

"Q. And will you tell us the conversation that you had with Mr. Henley?"

And you answered:

"A. It arose out of a general discussion regarding the Code that we were then working on. There were a number of questions involved on which there was a difference of opinion, and one was whether the situation should be 5355 created so that jobbers might exist in the industry. That was one of the matters discussed there.

"Several of us met"—and so forth and so on.

And it was suggested that you proceed to answer the question more directly. Do you recall that in your testimony yesterday? A. Yes, sir.

Q. Now, Mr. Sensibar, in 1931, 1932, 1933, and from then on down, did you know what the policy of the industry was with respect to jobbers?

Mr. Bromley: Objected to as immaterial.

Justice Stephens: Do you wish to be heard, Mr. Knuff? It seems to the Court immaterial what the policy of the industry was. That is so general that it can hardly prove anything in the case.

Mr. Knuff: We have stated in the complaint—

Justice Stephens: (Interposing) If you were talking about the policy of the defendants, that might be different, but your question was as to the policy of the industry. I don't assume to rule that that is admissible, but it would certainly be closer to the edge.

Mr. Knuff: The defendants comprise practically the entire gypsum industry. In so far as board is concerned, they are the industry.

Justice Stephens: That is the charge, but we have 5356 to apply the usual rules of evidence, and I think the question as phrased is not proper. The objection is sustained.

Mr. Knuff: Very well, I will rephrase it.

By Mr. Knuff:

Q. Mr. Sensibar, beginning with 1931, did you know what the policy of the defendants was with regard to jobbers of board in the gypsum industry?

Mr. Bromley: May that be answered "yes" or "no", if Your Honor please?

Justice Stephens: Just state "yes" or "no", whether you knew what the policy of the defendants was.

The Witness: Yes, sir, I did.

By Mr. Knuff:

Q. You say you did know the policy? A. Yes, sir.

Q. Of the defendants? A. Yes, sir.

Q. And will you tell us, in your own words, just what that policy was, please?

Mr. Bromley: Objected to as incompetent.

Justice Stephens: I should think, Mr. Knuff, on further reflection, that what you would have to do would be to show what each defendant did and said, which you have made some showing of, and let the Court determine what the policy was; that that is a conclusion which the Court might have to draw.

5357 What do you say as to that?

Mr. Knuff: Well, I wouldn't be inclined to say that the Court is wrong. I thought maybe I could take just a little shortcut. If you want me to develop it—

Justice Stephens: (Interposing) Thank you for your frankness, Mr. Knuff. I think the objection is well taken.

By Mr. Knuff:

Q. Did you ever talk with anybody in the United States Gypsum Company concerning jobbers of board in the gypsum industry? A. Yes.

Q. With whom did you talk? A. First, probably, with Mr. Henning.

Q. When you say "probably", do you mean you probably talked to Mr. Henning, or do you mean you probably talked to him first—which do you mean? A. First—that I probably talked to him first.

Q. When did you talk to him? A. In the summer of 1933, during those Code meetings.

Q. Will you relate what your conversation was? A. In a general way, I can tell you. During the discussions as to the various points that should have been put into the Code, I pointed out that in the past, the business of Cardiff had depended to a large extent on distribution through jobbers—the further back we go in the history of

5358 Cardiff, the more that is true—and that the sales problem for a company such as Cardiff then was,

was a very difficult one, and that jobbers fitted into that situation very well.

Justice Jackson: Are you talking about jobbers or commission men, which?

The Witness: Jobbers. (Continuing) And that we favored a recognized standing for jobbers in the industry.

By Mr. Knuff:

Q. What did Mr. Henning say? A. He said that a good many of the ills of the industry had, in the past, arisen out of the jobber situation, and that they had decided once and for all to put an end to it.

Q. That they had decided once and for all? A. So far as his company was concerned, yes, sir.

Q. That was in 1933? A. Yes, sir, beginning in June.

Q. And did you have any further conversations with Mr. Henning on that subject? A. Well, from time to time, in a general way, because there were a number of us there who espoused the same ideas, that the jobbers ought to be put back in the picture, and it came up a number of times.

Q. Did you talk with anybody else connected with
5359 USG concerning the jobbers? A. I don't remember that I did.

Q. Mr. Henning, then, is the only person connected with USG that you can remember talking to, is that correct? A. Well, I talked about it to a man who at that time was in charge of Chicago sales for USG, but I can't recall his name.

Q. At or about this time, did you ever talk to anyone connected with National? A. Pardon me, that man's first name was Dick, but I can't remember his second name.

Q. I am afraid "Dick" doesn't help me very much.

Mr. Sensibar, did you ever talk with anybody from National concerning National's attitude about jobbers? A. At the same time, yes, sir, I talked with Mr. Burley, who was attending those conferences.

Q. What was your conversation with Mr. Burley, what did you say to Mr. Burley and what did Mr. Burley say to you? A. It was very much along the same lines as my conversation with Mr. Henning. He said that they had had jobbers at the beginning of their business, and that they no longer favored that kind of a set-up.

Q. Now, when was that conversation with Mr. Burley? A. When?

5360 Q. Yes. A. During the summer, say June or July, and maybe into August, of 1933.

Q. Did you talk to Mr. Burley in company with Mr. Henning, or was your conversation with Mr. Henning separate and apart from your conversation with Mr. Burley? A. I can't remember that. These weren't formal negotiations or discussions. A whole group of us spent a whole summer there, and Lord knows, we talked about pretty nearly everything, from time to time.

Q. Are you sure that you talked to Mr. Burley on this subject? A. Yes, sir, I am.

Q. Did you talk with anybody else from National? A. I don't think so.

Q. Did you talk to anybody connected with Certain-teed, concerning the policy of Certain-teed about jobbers? A. With Mr. Warren Henley, who also attended all those meetings.

Q. When did you talk with Mr. Henley, and what conversation did you have with him? A. During this period of June to August, 1933; and the conversations were for the purpose of pointing out our belief that jobbers were justified and necessary in a sound gypsum industry, and asking his cooperation to put them in by means of the Code that was then being established.

5361 Q. And what was Mr. Henley's answer to you? A. That over a period of time it hadn't worked out, and that they preferred not to re-create that situation.

Q. Did you understand from that, that over a period of time the jobbers hadn't been of any benefit to the industry? A. To his company, so far as they were concerned.

Q. Did you talk with anybody in American concerning jobbers? A. With Arthur Black, yes.

Q. When? A. During this period, June, July and August, 1933.

Q. And what conversation did you have with Black? A. Mr. Black was one of those who wanted jobbers retained or re-created, so far as the gypsum industry was concerned, and we were together on that.

Q. Did you talk with anybody from Texas? A. I believe not.

Q. Did you talk with anybody from Kelley? A. No, sir.

Q. Did you talk with anybody from Ebsary? A. I think not.

Mr. Knuff: I don't know, if there are any other gypsum companies in the industry, I would ask the witness; but I can't remember any others.

You may cross-examine the witness.

5362 Cross Examination

By Mr. Bromley:

Q. Mr. Sensibar, the dealer distribution policy that you talked about is a policy applicable to a manufacturer, isn't it? A. I am afraid I don't quite understand.

Q. Well, when you mentioned the phrase "dealer distribution policy"—whose policy would that be, the policy of the dealer or the policy of the manufacturer? A. Well, did I use that in relation to our sales to dealers—is that how it was used?

Q. Don't you remember? A. No, sir.

Q. Well, isn't it the fact that the dealer distribution policy is the policy of the manufacturer of goods to sell those goods, in the gypsum industry, direct to building material dealers and masons' supply dealers, rather than to contractors? A. I get it now. The words I used were "dealer policy". That is right.

Q. Dealer policy? A. Yes. I didn't identify it, as you said, by "dealer distribution policy".

Q. When you used the phrase "dealer policy", you meant the same thing as the dealer distribution policy,
5363 didn't you? A. Yes.

Q. There is no difference, is there? A. I don't exactly know what you mean.

Q. Isn't the dealer policy a phrase which refers to the method of distribution, that is, through dealers? A. Yes, it does.

Q. And the method of distribution referred to in the phrase "dealer policy" is the distribution method of the manufacturer, isn't it? A. Yes.

Q. A manufacturer of gypsum products could either sell them to dealers, or he could sell them to ultimate consumers, such as housing contractors, couldn't he? A. That is right.

Q. And if it is the policy of any particular manufacturer to sell the gypsum product that he makes, only to dealers, then he is following what you call the dealer policy, isn't he? A. You had the word "only" in there. There might be exceptions and still have a dealer policy.

Q. Well, if most of the time he preferred to sell his product to dealers, then you would say that he was following the dealer policy? A. That is right.

Q. And the policy which is opposed to that, or
5364 different from that, would be a policy, on the part of a manufacturer, to sell directly to the ultimate consumer, such as contractors, wouldn't it? A. That is right.

Q. The manufacturer who sells directly to contractors in the majority of his sales, Mr. Sensibar, would be by-passing the dealer altogether, wouldn't he? A. Yes.

Q. And wouldn't you say that the effect of such a policy, that is, to sell to the contractor instead of to the dealer, if indulged in by a manufacturer to any great extent, would antagonize the lumber dealers and masons' supply dealers and building material dealers of the area in which the manufacturer sold? A. Yes.

Q. And that antagonism would spring from the fact that the manufacturer's policy of selling direct to contractors would cause the dealers to lose that business; isn't that right? A. Yes.

5365 So that if a manufacturer has a policy of selling mainly through dealers, he cannot make it a practice to supply his product directly to contractors, because to do so would destroy the trade of the main class of his customers, that is his dealers, isn't that right? A. Within certain limits.

Q. Well, the policies are inconsistent, aren't they? A. If you are going to pursue either policy—well, let me put it this way, if you are going to pursue one policy in a large majority of your business, obviously you cannot pursue the other one.

Q. Now, the policy of your company under Mr. Breen's control was to sell direct to contractors, wasn't it? A. The generally most truthful answer to that is no, that it was not the policy.

Q. What is the truthful answer? A. What I just gave you.

Q. It is still no? A. Yes.

Q. What did you mean when you testified here yesterday that you told these gentlemen whom you went to see that when you came into the picture you changed the Cardiff policy about distribution? A. I mean this, that under the Breen management the company had no size-
able sales organization. They had Tom Breen and
5366 two or three salesmen. That many salesmen naturally couldn't cover the large territory into which we shipped. The result of that was that the company had

a very limited number of dealer outlets, simply because they didn't have the manpower to cover them, and to fill in between these dealer outlets, where they had territories that were not covered by dealers, they sold directly to the contract trade. That wasn't because they preferred to do it that way. They preferred to sell to the dealers.

What I meant by the change in policy was that we undertook, beginning in 1935, to make the outlay necessary to establish a field organization that would cover the territory and that we were willing to make the sacrifice to a very great extent, of not selling to contractors in the territory in between where we had our direct dealer coverage.

Q. Well, whatever the reason for Mr. Breen's policy, a truthful answer to my question would have been that Breen followed the contractor policy, wouldn't it? A. No sir, I gave you the truthful answer.

Q. Well, didn't you just say that because he didn't have enough salesmen, he sold to contractors? A. That is right.

Q. Now, Breen's policy was also to cut prices in order to get business, even below his cost, wasn't it? A. No sir.

5367 It was not? A. It would be very foolish, wouldn't it?

Q. Well, was it or was it not his policy? A. No, of course not.

Q. You would agree, wouldn't you, that the Cardiff company under Breen's policy, did not follow what you thought were good business policies? A. That is right.

Q. And isn't it the fact, Mr. Sensibar, that a manufacturer which supplied Cardiff with materials under a distributing arrangement, or some similar wholesale arrangement, would antagonize the dealer-customers of the manufacturer? A. It probably depends upon what period you are talking about.

Q. Under the Breen management. A. Until about 1930, I couldn't say. I can tell you about after 1930.

Q. Well, I was asking you as an experienced businessman. Wouldn't it be unwise for a manufacturer who was following the dealer policy, to have a distributor who was following the contractor policy? A. In that situation, if you want my opinion, it is no, that it would have been wise for them to have made that kind of a deal with Tom Breen.

Q. And you don't think that if one of the board
5368 manufacturers had made that arrangement it would have resulted in antagonizing the dealer-customers of that manufacturer in the territory in which Breen operated? A. You are dealing there with a lot of people. Each one has his own ideas, and it is pretty hard to generalize about a whole group. Some would have objected, but I believe that, taking it all-in-all, it would have been wise for them to have gone along with him on that policy.

Q. But you concede, don't you, that a business man might have been reasonable in concluding that he would prefer not to distribute through a distributor who sold to contractors? A. That he would have been what?

Q. Reasonable in his judgment, even though you disagreed with him? A. A lot of people can disagree with me and still be reasonable.

Q. And your answer to my question is yes, then, isn't it? A. No, I don't think I can say that. I don't think it was a reasonable policy by USG.

Q. The Cardiff Company, during all of this time, would, if supplied with board by any one of the manufacturers, have been in competition with the manufacturer
5369 who sold to it, wouldn't it? A. Yes sir.

Q. In other words, for one of these board manufacturers to sell to Cardiff would have just added to the competition that that manufacturer would have had to meet, would it not? A. In an academic way, yes sir. It might also have added to his profits.

Q. Suppose the Cardiff Company had been supplied board out of a manufacturer's mill at Fort Dodge. A. Yes sir.

Q. The Cardiff Company and the supplier with the mill located there, would have been soliciting the same trade, wouldn't they? A. That is right.

Q. Don't you call that competition for business? A. Yes. That was just the situation when I talked with Mr. Harrison, and he thought it would be good for National.

Q. But some other salesman might conclude that it would be bad for a supplier to furnish Cardiff goods to compete with it, isn't that right? A. It was usual practice in the trade.

Q. Now, won't you answer the question? A. Will you repeat it?

(The reporter read the question as above recorded.)

The Witness: Yes.

By Mr. Bromley:

5370 Q. Now, your company, you said, went into bankruptcy in 1935—that is right, isn't it? A. That is right,

Q. That means, doesn't it, that a considerable number of the creditors of your company were left unpaid? A. In cash, yes.

Q. And don't you think that a manufacturer who was approached to sell the Cardiff Company, board, after 1935, would give some consideration to the credit risk? A. Yes, but no one ever questioned that. Nobody ever said to me, "We would sell you, Ezra, but we are afraid you can't pay your bills."

Q. You know, don't you, that your Dun and Bradstreet reports during all the period subsequent to 1935 were, to say the least, very bad? A. No, I don't, I never saw a Dun and Bradstreet report on our company.

Q. Did you ever give a statement to Dun and Bradstreet? A. No sir.

Q. It is a fact, isn't it, Mr. Sensibar, that in 1938 and 1939 there was an upturn in building which left the board manufacturers without the capacity to fill their own customers' needs? A. No, you have that date a little wrong. That upturn was in 1937. 1938 was a worse year than 1937.

5371 Q. 1937 was the year, was it? A. 1937 had a considerable upturn, yes. 1938 had a downturn.

Justice Stephens: We will take the afternoon recess.

(Whereupon a five-minute recess was taken, after which the trial was resumed as follows:)

Justice Stephens: Mr. Steffen, do you wish to get away at quarter of four tonight?

Mr. Steffen: I would like to, your Honor.

Justice Jackson: Can Mr. Knuff carry on until four?

Mr. Steffen: Oh, I think so.

Justice Jackson: Then you can go at any time you want to. (Laughter).

Mr. Steffen: Thank you.

Justice Stephens: Proceed, Mr. Bromley.

By Mr. Bromley:

Q. In your talks with various representatives of the different board manufacturers that you have mentioned, you

realized at all times, didn't you, that you were asking for a supply of patented board? A. Yes, sir.

Q. And your knew, of course, that the patented board which you were seeking was made by these companies, as licensees under licenses with USG, which did not give those licensees the right to sell you that patented product without the consent of the licensor? A. In a gen-

5372 eral way, that was my understanding.

Q. You have testified before about these various talks which you had with the representatives of the manufacturers haven't you? A. I have, yes sir.

Q. And you testified at the criminal trial about them, didn't you? A. That is right.

Q. And this time you have dressed that testimony up a little, haven't you? A. No sir.

Q. You haven't? A. Not a bit.

Q. Haven't you dressed it up a little to emphasize the part that USG played in it, and to exaggerate the discussions about cutting prices on plaster? A. If anything, my friend, there are hundreds of little talks here and there along the line that I have forgotten. This was over a period of 10 or 12 years, and if I could give you the whole story it would be a lot more lengthy and detailed than what I have given you.

Q. Didn't you try to give it in the criminal case? A. I did my best, yes sir.

Q. You want the defendants to lose this suit, don't

5373 you? A. Yes.

Q. And you were disappointed in the result of the criminal case, weren't you? A. Naturally.

Q. And it is your purpose now, and has been for some time, to bring a treble damage suit against the defendants, isn't it? A. No.

Q. You have already consulted counsel about it, haven't you? A. It so happens—

Q. (Interposing) Wait a minute. Can't you tell us that without talking about it? A. Yes, I can say no, I have not consulted counsel about it.

Q. But it so happens that there are two lawyers on your board of directors, doesn't it? A. That is right.

Q. And you have talked to them about it, haven't you? A. Quite naturally. The question of the generally unfavorable losing situation, you may be sure, has been discussed more than once. Those people are stockholders. It is their money as well as mine.

Q. And you are going to sue these defendants for treble damages whenever this case comes to an end, aren't
5374 you? A. I don't know, Mr. Bromley. If we have a means of recovery, and if the company is able to afford the expense of the effort involved to get some recovery, and try to get something back for our stockholders, we certainly are going to try to do everything we can in that connection.

Q. To put it shortly, if the Government wins this suit, then you will sue the defendants for treble damages, won't you? A. No. The answer to that is no. It depends on a whole lot of circumstances, and I cannot give you a categorical answer that you want, that we will sue USG—I don't know.

Q. You mean you have not yet finally decided, is that it? A. I presume in the end it will be a combination of a legal question and a business question, Mr. Bromley.

Q. Then you have not yet finally decided, have you? A. No, naturally.

Q. Well, you threatened to sue USG once before, didn't you? A. No.

Q. Didn't you go to the Department of Justice and complain to it? A. No, I did not.

Q. Didn't you have a conference with a lawyer named Price in Chicago, at which you threatened to sue
5375 USG? A. No sir, that wasn't the way it was at all.

Q. It wasn't? A. I never understood that Mr. Price was a member of the Department of Justice, either.

Q. I don't mean to intimate that he was. Didn't you go to a lawyer named Charles Price, counsel for USG, and threaten to bring a suit against USG? A. No sir.

Q. What was this mention you made this morning about putting the matter up to some Government agency—you meant the Federal Trade Commission, didn't you? A. Frankly, I didn't know who I meant, but I felt at that time, in 1938, that this situation was so outrageous, which we had been trying to get corrected for several years, and that very evidently USG didn't want to correct it, and without knowing what agency, I felt that certainly some agency in Washington would be interested in it, and I suggested that we go and present the matter to them, not by way of a court procedure, but by way of getting an opinion about it, and that was rejected.

Q. Like the Department of Justice? A. I tell you I didn't have in mind what agency it might be, I didn't know.

Q. You did have the Department of Justice in
5376 mind, didn't you? A. No sir, I didn't have any department in mind.

Q. Didn't you have the Federal Trade Commission in mind? A. I didn't have any department in mind. I didn't know, I am not a lawyer, Mr. Bromley.

Q. And you testified before the Grand Jury, didn't you? A. Yes, I was subpoenaed.

Q. And you have tried to get others to testify for the Government in this case, haven't you? A. No sir.

Q. Well, you testified to the conversation which you said you had with Mr. Holland of Universal in 1933, during the criminal trial, did you not? A. Yes, I think I did.

Q. And at that criminal trial you told the Court and jury there as fully and frankly as you could remember, what your conversation with Holland was, didn't you? A. I think I did.

Q. And when you testified about that same conversation here, you added something—do you remember? A. No, I don't.

Q. Don't you remember that when you testified here you added a reference to a mention of Cardiff cutting prices on gypsum plaster? A. Is your question whether I re-
5377 member adding something to it; is that your question?

Q. No. My question was intended to be—when you testified here, didn't you add something that you had not said at the criminal trial at all? A. I don't know. In each case I have tried my very best to remember everything that happened and to relate it, and I am sure I can't tell you whether there is something more in my testimony yesterday or today than there was two years ago.

Q. Can you tell me now whether you said at the criminal trial that in your Holland conversation there was talk about Cardiff cutting prices on plaster? A. I don't know. Is there a record of my testimony of two years ago here?

Q. Yes. Would you like to see it? A. I would be very glad to.

Q. Do you recall that you told us here when you were describing your conversation with Holland, that Holland said something about Cardiff cutting prices on plaster? A. Yes, I think I did. In any event, he said something about it.

Q. Now, you asked if the criminal record was here. Haven't you read your testimony in the criminal trial? A. Yes sir, I have.

Q. That is one of the first things you did when you
5378 came to Washington, wasn't it? A. A month ago, yes sir.

Q. You went to Mr. Knuff's office and read it over carefully, didn't you? A. Yes sir.

Q. And that little black book you have got in front of you contains the notes you made when you read over your criminal testimony, doesn't it? A. You are welcome to it.

Q. Could you answer the question? A. No. What this contains is notations as to the several years when these conversations were held, and the names of the people with whom I held the conversations during particular years, as nearly as I can remember. You are quite welcome to it, there is no secret about it.

Q. You had that little black book at the criminal trial, did you? A. No.

Q. You didn't? A. No.

Q. When did you make it up? A. About ten o'clock last night.

Q. And you have been consulting it right along during your direct examination, haven't you? A. Today, yes sir.

5379 Q. Did you tell any representative of the Department of Justice about these conversations prior to the criminal trial? A. Yes.

Q. And did you aid the Department of Justice in the preparation of the bill of particulars that had to do with the conversations that you had had with these manufacturers? A. No sir, I never knew anything about it.

Q. Well, now, would you look at your criminal testimony?

(Copy of testimony of the witness on the criminal trial was handed to him.)

By Mr. Bromley:

Q. Do you recall that you testified this morning, or rather yesterday afternoon, that in your talk with Holland in 1933, Mr. Holland—

Mr. Steffen: (Interposing) May we have the page, please?

Mr. Bromley: Page 5530.

By Mr. Bromley:

Q. (Continuing)—that Mr. Holland said, "that there was a general impression in the industry that Cardiff had been

cutting prices on gypsum plaster; that he doubted, under those circumstances, whether we could make a connection to get board."

You remember that? A. Yes sir.

5380 Q. Now will you look at your testimony beginning at page 2497 of the criminal case? It isn't there, is it? A. No. I am sorry I forget this point. I should have testified to this here, this morning or yesterday.

Q. Now what are you referring to? A. This, you just asked me to read.

Q. You are sorry you forgot what? A. Shall I read it?

Q. Just give me a reference to it. A. Beginning at line 17 on page 2497 and going over to page 2498, line 14.

Q. So that when you testified here yesterday afternoon you left out altogether what you had said at the bottom of page 2497, didn't you? A. I overlooked it, yes sir.

Q. You didn't say anything about it, did you? A. No sir.

Q. Just read what it was you told us in the criminal case about your Holland conversation, will you? A. Yes.

"I explained to him the desire of our company to have a connection similar to other plaster manufacturers in the industry, such that we could buy board and lath at a dis-

5381 count under the price at which we would sell it to the building material trade. He replied to me that as far as they were concerned there would be some objection to that, that our men would be out visiting the same building material dealers to a very large extent, to whom they were selling lath and board, and that that might be an objection."

Q. You didn't mention that yesterday afternoon at all, did you? A. I overlooked that.

Q. Well, it was a very important overlooking, wasn't it? A. I am sure I don't know. Mr. Bromley—

Q. (Interposing) That happened— A. (Interposing) Now wait a minute.

Q. That happened, didn't it?

Mr. Steffen: Let the witness answer. He was continuing to answer that question.

Justice Stephens: Finish your answer.

The Witness: I was about to say to Mr. Bromley that I am now being asked to recall details of conversations that took place over a period of years. This one took place over eleven years ago. I did my best at the criminal trial to recall those conversations, and I did my best here. Naturally, some things I recall now that I didn't then, and vice versa.

By Mr. Bromley:

5382 Q. So that it would be very easy for you unconsciously and not meaningly, to create an entirely false impression about these conversations, wouldn't it? A. No sir, because I am telling all the truth I can remember in both instances.

Q. Well, let's see if that is so.

You told us here yesterday afternoon that Mr. Holland had told you, in answer to the question,

"Q. Did he tell you why they had refused it?"

that Mr. Holland had said,

"A. He told me that there was a general impression in the industry that Cardiff had been cutting prices on gypsum plaster; that he doubted, under those circumstances, whether we could make a connection to get board."

Now, you didn't mention that in the criminal case at all, did you? A. I don't know, I haven't read through the rest of this testimony.

Q. Well, read it.

Mr. Knuff: If your Honor pleases, I haven't any objection if Mr. Bromley wishes to incorporate in the record the entire testimony of this witness given at the criminal trial.

Justice Stephens: The record may show that you are willing that that be done.

By Mr. Bromley:

5383 Q. It isn't there, is it? A. No sir.

Q. Now yesterday afternoon you also said that you said to Mr. Holland:

"I explained to him the situation of the Cardiff Company, that the control had changed hands, and that I understood the objections of the industry to the policies of the company under the management that had existed up to that time; but I explained that a change had taken place, and in view of that I asked him what he would advise us to do, as newcomers entering into the control of the company."

Now you didn't say anything like that in the criminal case either, did you? A. I think that is correct.

Q. Now is it true— A. (Interposing) Wasn't that a later meeting I was talking about yesterday, than this one?

Q. Well, was it? A. I think so.

Q. You think so? A. Yes. Didn't I tell you yesterday, or tell the Court, that there were several meetings with Mr. Holland, not just one?

Q. Well, what is your recollection, one? A. There were several.

5384 Q. There were several? A. Yes. We had a lot of those general discussions throughout that summer from June to August.

Q. Well, is it your testimony that in the criminal case you were only talking about one conversation, whereas in this case you were talking about several? A. I have done my best to remember the conversations, the several times when they were had, Mr. Bromley.

Q. I want to know what you mean by what you just said. Were you trying to create the impression that in the criminal case you were only talking about one conversation, and that in this case you were talking about several? A. I don't know, I am sure, whether I was talking in the criminal case about one or more.

Q. You don't, in spite of the fact that your eyes are now directed precisely at the question. A. Maybe it says so here.

Q. Well, doesn't it say so? A. I don't know.

Q. Look at line 13: "There were a number of conversations, several of them took place in his office in Chicago.

"Q. Would you relate these conversations for the Court and jury, please?"

Do you see that? A. Yes.

5385 Q. Now it is true, isn't it, as you testified in the criminal case at the bottom of page 2497, that whatever else Holland may have said to you, he told you that since your men would be out soliciting the same material dealers to a very large extent, as his men, that that might constitute an objection to your buying board from Universal? A. Yes sir, and he afterwards withdrew that and was perfectly willing—

Mr. Johnston: (Interposing) We cannot hear him.

The Witness: He afterwards withdrew that as an objection and said that he would be willing to sell us.

By Mr. Bromley:

Q. Well, did you say anything about that in the criminal case? A. I don't remember.

Q. Well, look at it and see. It is all there in the space of two or three pages. A. Yes. I said:

"I pointed out to him then that the discount that we were asking for, and which was customary, was a discount which really is smaller than what it costs to sell the board and

lath. So that even if it were true that we would be selling to his customers, his company would be just as well off to have us to sell it as they would themselves. He recognized that",

and so on.

Q. Now, you wanted the Court to understand from
5386 your testimony here, didn't you, that Holland was telling you that none of the board companies would sell board to you? A. That that was his opinion, yes sir, and that he thought that the best bet would be to take it up with American, that we would have more chance with them.

Q. You didn't say anything about that in the criminal case, didn't you? A. Maybe not.

Q. Well, isn't it the fact, Mr. Sensibar, that it was Mr. Holland who suggested that you go to the American Gypsum Company? A. Yes, I just said so.

Q. Well, you don't mean to say, then, that he told you that none of the companies would sell you board? A. That in his opinion it wasn't likely that they would.

Q. Well, what did he want you to go to American for? A. He thought that was the best possibility.

Q. And thereafter you went to American? A. I did, yes.

Q. Now, in your conversation with Mr. Black—you testified about that conversation at the criminal trial, didn't you? A. Yes.

Q. You told us here that the decision as to whether Black would sell to you would depend upon what
5387 USG would permit American to do—didn't you? A. In the last analysis, yes.

Q. Now, when you gave that testimony here, you meant by that, that Black said it would depend on whether USG would grant American a consent to sell your company patented board, didn't you? A. Yes.

Q. Now in the criminal trial, at page 2500, you testified that Black told you he would have to sell his own people on the idea that this would be a profitable connection. Do you see that? A. I think I testified to that here too.

Q. You do? A. That is my impression, yes sir.

Q. Well, is that the fact, is that what Mr. Black told you? A. That is right.

Q. Now when you told the story here you said, didn't you, that there was a lengthy discussion on Cardiff's sales policies with reference to plaster? A. Well, there was, in any event. I think I said that.

Q. Did you say it in the criminal case? A. I don't remember.

Q. Well, can you look and see? A. Yes.

5388 Q. Look at page 2500. A. No, I don't see that here.

Q. No reference to plaster prices at all appears in the criminal case, does there? A. Oh, yes.

Q. So far as your conversation that we are talking about now? A. It seems to me that I testified about that Community Housing Project in Indianapolis.

Q. You realize that I am asking you about 1933? A. Here?

Q. Yes. A. Yes.

Q. There was no mention in your criminal testimony about any plaster prices in the 1933 meeting with Black, was there? A. No, I don't see it.

Q. Now you went to see Mr. Henley of Certain-teed in 1933, you said. Is that right? A. Yes, I think that is right.

Q. You couldn't remember that without that little book, could you? A. Does it bother you that I use the book?

Q. Could you remember it without your little

5389 book or couldn't you? A. I think so.

Q. Well, what do you look at it each time for? A. If it bothers you, I won't.

Q. What do you look at it for? A. Just to be sure.

Q. What did you use last night when you made that little book up? A. What did I use?

Q. Yes, to refresh your recollection, if anything? A. I looked over something similar to this (indicating copy of minutes of the criminal trial which had previously been handed to the witness) of my testimony at the criminal proceedings.

Q. And you had your criminal testimony last night? A. That is right.

Q. I thought you told me a minute ago that you had read it over a month ago. A. That is right.

Q. But you read it over again last night? A. I scanned through it, picking out the dates.

Q. And you made those notes from your criminal testimony? A. That is right. Well, a lot of them were added because there were a lot of things that weren't in the criminal testimony at all.

Q. There were? A. Yes.

5390 Q. Do you know how that happened? A. I was there when part of it happened, anyway. The Certain-teed testimony was excluded.

Q. Is that the reason for all of your omissions in your criminal testimony? A. I don't think I know what you mean by "omissions" there.

Q. Well, you say you didn't testify to the Certain-teed conversations. A. Yes, it wasn't admitted.

Q. Because they were objected to? A. Yes.

Q. Now there were a great many other conversations that you testified to here that you didn't testify to at the criminal trial at all, weren't there? A. I don't know.

Q. You don't know? A. No sir.

Q. You can't even tell from the little book? A. It seems to me that Texas was not touched on—

Q. (Interposing) Was there an objection to Texas at the criminal trial? A. I don't know, I'm sure.

Q. Don't you know that Texas was listed in the bill
5391 of particulars in the criminal trial? A. I don't know, no sir.

Q. Don't you know that you gave no testimony with respect to any conversation with anybody from Texas at the criminal trial? A. I just said I think there was nothing in the criminal trial about Texas.

Q. From you? A. That is right.

Justice Garrett: I had the impression that Texas was not involved in that indictment. Am I wrong about that? Where did I get that impression?

Mr. Bromley: That is right, your Honor; it was named in the bill of particulars, however, under this charge, and testimony of course was received as to it, because it was alleged to be a co-conspirator, although not a defendant.

By Mr. Bromley:

Q. Now didn't Mr. Henley tell you in 1933 that he would see whether he could convert other members of his organization to his own belief that you ought to be sold? A. Yes, I think he did.

Q. Now, when you said, "other members of the organization", you meant other employees or officers of Certain-teed, didn't you? A. Yes.

Q. You told us yesterday that Mr. Henley had
5392 told you that there was a constant stream of complaints from his sales organization about situations where Cardiff had sold plaster off the market price. Do you remember that? A. I do.

Q. In using the word "complaint", you meant merely, did you not, reports by Certain-teed's salesmen to the head of the Certain-teed sales department? A. Reports in the nature of complaints, yes sir.

Q. But whether they were reports or complaints, they were from Certain-teed's salesmen to Certain-teed's executives? A. That is right.

Q. Now was there any basis in fact whatsoever for Henley's statement that Cardiff was constantly cutting prices on plaster? A. Would you mind repeating that?

(The reporter read the question as above recorded.)

The Witness: I don't think I said that Mr. Henley said that. What he said was that there was a constant stream of complaints coming to his desk regarding—

By Mr. Bromley:

Q. (Interposing) Regarding what? Regarding the cutting of prices on plaster by Cardiff, wasn't it? A. That is right.

Q. Let me ask you, was there any basis in fact
5393 for that statement by Mr. Henley? A. Well, I am not trying to quibble with you. I don't question that he had those reports from his salesmen, if that is what you mean?

Q. Well, the reports were not true, were they? A. In general, no. It is a constant experience of all of us that when a salesman loses an order, he sends a complaint to the home office that somebody else cut the price.

Q. That is commonly used by salesmen as an alibi for failure to get orders, isn't it? A. I'm afraid it is.

Q. Wasn't this statement that Henley made to you a statement with respect to the period of time after you had taken over control of Cardiff? A. No, it was a statement regarding his general experience up to that time in 1933; during the last three years of that period, I did, in fact, have stock control of the company, but I was not directing the sales policies of the company until sometime after 1933.

Q. Well, would a statement like that have been true after you commenced to direct the sales policies of the company? A. No sir.

Q. Were you a price-cutter? A. No sir.

Q. Was the Cardiff Gypsum Company a price-
5394 cutter on plaster? A. No sir.

Q. After you took control of the company, in the sense of directing it, it seldom, if ever, cut a plaster price, did it? A. That is true.

Q. Now is it your testimony that Mr. Henley, after telling you that he had been receiving a constant stream

of complaints about Cardiff's price-cutting, nevertheless voluntarily offered to enter into a business association with you? A. No, that wasn't my testimony.

Q. Well, you testified that he did say that he was in favor of doing business with you? A. That is right, he did.

Q. He did? A. Yes sir.

Q. After mentioning this constant stream of complaints, he nevertheless said that he thought Certain-teed ought to do business with you? A. As a result of considerable discussion and negotiation, he did, and I might say, after some investigation of some of those complaints.

Q. Well, in the criminal case you testified about a conversation that you said you had with Mr. Henning
5395 in 1935—do you remember? A. No, I don't.

Q. Well, do you remember that you testified that you had a conversation with Mr. Henning which was initiated by Mr. Knode? A. Did you just say Mr. Henning or Mr. Henley?

Q. Henning. A. I am sorry, I understood you to say Mr. Henley. Would you ask that again, please.

Q. You testified about a conversation you had with Mr. Henning in 1935, didn't you? A. Yes sir.

Q. And here, after tesifying about it, you said you were sure that that conference was initiated by Mr. Knode, do you remember that? A. Yes sir.

Q. And do you recall the other day when you first testified about this conversation that you said that after you had talked with Mr. Knode, he referred you to Mr. Keady? A. Yes, I became confused about Mr. Keady and Mr. Charles Henning, as to that particular conversation.

5396 Q. Then I take it you will want to withdraw all of your testimony about your alleged conversation with Mr. Keady in 1935? A. I think I corrected that at the time.

Q. I do not think that you did, and that is why I ask it. Whether you did or not, don't you now want to withdraw your testimony about any alleged conversation with Keady in 1935? A. Well, wasn't that corrected at that time to Mr. Charles Henning from Mr. Keady?

Justice Jackson: I thought it was corrected.

Mr. Knuff: I thought it was.

Mr. Bromley: Well, it leaves us in this state: He has testified at length to a conversation with Keady which he had in 1935; and then he says he didn't have a con-

versation with Keady, he had one with Henning, and he proceeded to tell what the Henning conversation was,—which leaves us with his testimony at pages 5548 to 5550, all about what was said between him and Keady, when nothing was said.

Justice Stephens: Well, you can bring out by further cross-examination that nothing was said between him and Keady, I suppose. You may proceed.

By Mr. Bromley:

Q. Nothing was said between you and Keady in
5397 1935, at all? A. That is correct.

Q. And the conversation that you described as having had with Keady could not apply to what you and Henning talked about, because you talked about Keady saying he was a newcomer in the business, and things that Mr Henning never could have said? A. That is right. That conversation with Keady actually took place some time later.

Q. Well, you testified that it took place in 1938, and you later on told us what it was, in detail? A. I think that is right.

Q. So I ask you now, don't you want to withdraw the testimony that you gave with respect to any conversation with Keady in 1935? A. I didn't talk with him at all in 1935.

Q. But you are sure, you say, that your talk with Henning was initiated by a conference with Mr. Knode? A. Yes, sir.

Q. Now, you didn't say anything about that in the criminal case, did you? A. I don't remember.

Q. Would it surprise you to know that you didn't? A. No, it wouldn't surprise me.

Q. Will you look at page 2524 of the transcript
5398 in the criminal case? A. Yes, sir.

Q. There is no question of it there, is there? A. No, sir. This is 1933, isn't it?

Q. 1935, I think. A. If you will look at line 17.

Q. I have seen line 17, and in line 24 the question is:

"Q. Did you ever talk with Mr. Henning in 1935? A. Yes, sir, I did."

And over the page at 2525, you go on to tell all about that, don't you? A. Yes, I go on to tell about it.

Q. And you don't mention a thing about Mr. Knode, do you? A. No, not there; no sir.

Q. Do you know of any other place in the criminal case where you did mention him with respect to your talks with Henning? A. I don't remember.

Q. Now, your discussion with Henning in 1935 was to the effect that you wanted Henning, or USG, to sell you patented gypsum board, wasn't it? A. Yes, sir.

Q. And isn't it the fact that Mr. Henning refused
5399 to make any arrangement with you? A. This is 1935?

Q. Yes, 1935. A. Yes, that was the conclusion of it.

Q. Well, Mr. Henning never made any arrangement with you at any time, did he? A. No.

Q. Now, it was at this meeting in 1935, wasn't it, when your proposition was that if Henning gave you a supply of board, you would resell not only the board but your plaster at market prices? A. You say that was the proposition?

Q. That you made to Henning.

Mr. Knuff: I don't recall the witness testifying that he made any proposition to Henning at all, in the form of a proposition, as such.

Mr. Bromley: Are you objecting to the word "proposition"?

The Witness: No, I was thinking about the whole thing.

Justice Stephens: Counsel for the defendants is entitled to ask the witness what he did propose, if anything, to Henning.

Mr. Bromley: I will withdraw the question.

By Mr. Bromley:

Q. Didn't you say to Henning that if Henning gave you a supply of board, you would resell not only the board but you would sell your plaster at market prices?
5400 A. That was the time, as I recall, that I pointed out to him—

Q. (Interposing) Can't you answer my question? A. I am doing it.

Q. Can't you tell me "yes" or "no"? A. Do you mind letting me go on for a minute?

Q. I mind, yes—

Justice Stephens: (Interposing) You should answer the questions responsively, Mr. Sensibar, if you truthfully and accurately can.

What is the last question?

(The question referred to was read by the reporter.)

The Witness: No.

By Mr. Bromley:

Q. Well, haven't you told us here, with respect to every conversation you had with everybody, that you told them the Cardiff Company's policy had changed, and you were going to sell plaster at market prices? A. Now, if you will let me, I will tell you what I did tell him.

Q. Can't you answer that question "yes" or "no"?

Mr. Knuff: May it please the Court, Mr. Bromley before asked the witness to answer a question "yes" or "no". The witness answered the question, and then
5401 he obviously meant to explain the answer, and before he could even explain the answer another question was fired at him. I think it is unfair to pin a witness down to a "yes" or "no" answer without giving him an opportunity to explain his answer.

Justice Stephens: Well, the Court has admonished the witness at the beginning of his examination, and also, in effect, a moment ago, that he must answer responsively, if he can do so truthfully and accurately, which clearly implied that he need not if he cannot do so truthfully and accurately. But if the question can be answered, truthfully and accurately, "yes" or "no", then the examining lawyer is entitled to have it answered in that manner. Then, if an explanation is thought necessary by adverse counsel, he can bring it out on re-direct.

Mr. Knuff: I think that is all true, and I have no quarrel with Your Honor on that; but the witness clearly indicated that he wanted to explain his answer, and I think in fairness to the witness he ought to be allowed to explain the answer.

Justice Stephens: Read the question.

(The record was read by the reporter as requested.)

Justice Stephens: Can you answer that question "yes" or "no", correctly and truthfully, whether you did or did not tell that to Mr. Henning?

5402 The Witness: I did not.

Justice Jackson: Is it capable of being answered by a "yes" or "no" answer?

The Witness: Not very well. The best answer I can give is "no".

Justice Stephens: You are not required to give a "yes" or "no" answer. But I don't quite see why that question can't be answered, truthfully and accurately, "yes" or "no". Either you told him that or you didn't tell him.

The Witness: I didn't tell him.

Justice Stephens: You see, Mr. Sensibar, you are not supposed to argue this case with opposing counsel. Anything that needs to be explained, Mr. Knuff will have an opportunity to bring out on re-direct-examination. It seems to me that that question can be answered, truthfully and accurately, "yes" or "no". That answer may stand.

You may conduct re-direct-examination on this topic if necessary, Mr. Knuff.

We will take a recess.

(Thereupon, at 4:00 o'clock p.m., a recess was taken until 10:00 o'clock a.m., Monday, March 27, 1944.)

5403 IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA,

Plaintiff,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS,

Defendants.

Seventh Floor,
Internal Revenue Building,
Washington, D. C.,
Monday, March 27, 1944.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

APPEARANCES:

(Same as heretofore noted.)

5406 Justice Stephens: Take the witness stand, Mr. Sensibar.

Thereupon, EZRA SENSIBAR, the witness on the stand at the time of adjournment, resumed his testimony as follows:

Cross Examination (resumed)

By Mr. Bromley:

Q. When did you start directing the sales policies
5407 of the Cardiff Company? A. I had some hand in them from about 1933, Mr. Bromley, and entirely after 1935.

Q. Well, just what hand did you have in them between 1933 and 1935? A. I had conferences from time to time with Tom Breen, who at that time was Manager and Vice President, and was actively in charge of the affairs of the company. I had conferences with him between 1933 and 1935, from time to time. After the reorganization in 1935, I was made President, and took the entire responsibility for the sales policies.

Q. Prior to 1935, your office was in Fort Dodge, was it? A. Yes, sir.

Q. So that you saw Mr. Breen daily, did you? A. No, sir, I never lived in Fort Dodge. I was living in Chicago during that period.

Q. How often were you in Fort Dodge? A. I should say every four or five or six weeks, for a couple of weeks at a time, or something like that.

Q. Then you were in the Chicago office of the Cardiff Company, is that right? A. That is right.

Q. And you spent all your time in the Chicago Cardiff office instead of the Fort Dodge office? A. Well, the time I wasn't in Fort Dodge, yes, sir.

5408 Justice Stephens: How long a period? I didn't quite understand one of your answers. I understood you to say about every six weeks for two weeks. Do you mean you would stay in Fort Dodge for a couple of weeks at a time?

The Witness: That is right, sir.

Justice Stephens: I see. Thank you.

By Mr. Bromley:

Q. You started with the company in 1930, you said? A. As a stockholder, and about that time as Vice President, yes, sir.

Q. And you were a Vice President between 1933 and 1935, weren't you? A. That is right.

Q. So you didn't change the nature of your activities between 1930 and 1935, so far as Cardiff was concerned, did you? A. I became increasingly active in its affairs, Mr. Bromley. I started out as a stockholder in 1930, with

no knowledge whatever of the business; and as time went on, I took a more active hand in it.

Q. Well, you started out as Vice President, too, didn't you? A. Shortly after I acquired a stock interest in the company, I was named Vice President, yes, sir.

5409 Q. Did you ever live in Fort Dodge? A. You mean was it ever my legal residence, did I ever have my family there?

Q. Yes, sir. A. No, sir.

Q. Not even after you became President of the company? A. That is correct.

Q. How often would you go out there after you became President? A. Well, for quite a period during 1935 and 1936 and 1937, I must have spent half my time there; and less after that.

Q. And the rest of your time you spent in the Chicago office, did you? A. Not all of it, no, sir.

Q. Now, wasn't it October, 1934, when the involuntary petition in bankruptcy was filed against Cardiff? A. No, my recollection is definite that it was in January of 1935.

Q. Do you differentiate between the adjudication and the filing of the petition? A. Well, sir, you are in pretty deep for me. I am sure I don't know.

Q. What I mean by that is, don't you remember that the proceedings which resulted in the bankruptcy of your company were started in the fall of 1934?

5410 A. No, sir, my recollection is that the bankruptcy took place in January of 1935.

Q. At several places in the record, you used the word "independent" in connection with the phrase "independent members of the industry". Do you remember that? A. Yes, sir.

Q. By the use of the word "independent", you intended to indicate, did you not, single-plant manufacturers? A. Yes, sir.

Q. At all times when you had meetings or conferences with representatives of the United States Gypsum Company, you knew that it was selling board to a manufacturing distributor named Wasem Plaster Company, didn't you? A. Yes, sir.

Q. You knew the head of that company, Henry Wasem, didn't you? A. Yes, I knew him.

Q. He lived in Fort Dodge, didn't he? A. That is right.

Q. And his plant was located in Fort Dodge? A. That is right.

Q. It is an old, well-established plaster manufacturing company, isn't it? A. Yes.

Q. And their plant and place of business is very
5411 close to the plant and place of business of Cardiff?
A. That is right.

Q. And, of course, Cardiff and Wasem were in competition with one another, weren't they? A. Yes, sir.

Q. Serving almost exactly the same territory? A. That is true.

Q. And you knew that the Wasem Company had had a close business association with the United States Gypsum Company for more than 20 years, at the time you got into the Cardiff business; isn't that right? A. No, I can't say I knew that. I knew it was old; I didn't know how old it was.

Q. Wasem manufactured plaster but did not manufacture board, isn't that right? A. Yes, that is correct.

Q. And Wasem had always purchased its board from the United States Gypsum Company, so far as you knew, hadn't it? A. I could only say about the time after I became interested in Cardiff. So far as I know, they purchased from USG after that, yes, sir.

Q. Now, isn't it a fact that Mr. Henning, when you saw him for the first time back in 1935, told you that, of course, it wouldn't be good business for USG to supply board
to another manufacturing distributor like Cardiff,
5412 which was practically in the backyard of the Wasem
Company? A. Is it a fact that he told me that?

Q. Yes. A. No, sir, it is not a fact. He never told me that.

Q. Do you say that that situation was never discussed between you? A. That is correct, it was never brought up as an objection.

Q. Does that ~~mean that you~~ didn't mention it, either? A. Well, now, I can't say. I might have said to him that we ought to be treated the same as Wasem. But that was never raised as an objection.

Q. Well, did Mr. Henning remain silent when you said you thought Cardiff ought to be treated the same as Wasem? A. I don't recollect definitely that I told him that. I just said to you that I might have said it in that way.

Q. Don't you recollect that he replied very promptly, "Well, I don't see how we can sell you, with Wasem right there in the same territory."? A. No, I just told you that

he never raised any such thought as an objection, Mr. Bromley.

Q. I am asking you whether he didn't raise it in response to your raising the matter? A. Well, first of all, I don't know whether I raised it that way, but he never
5413 raised it as an objection. I am clear on that.

Q. You can't remember whether or not you mentioned it, but you are sure he didn't mention it; is that it? A. That is correct.

Q. You never asked Henning, at any time, if he had refused to grant consents to Universal or American or Certain-teed to sell you, did you? A. I don't believe I did.

Q. Now, what is the date which you fixed as the date of the conference that you had with Messrs. Knode, Keady and English, of the United States Gypsum Company? A. To the best of my recollection, that was in the fall of 1938.

Q. There was only one such conference at which all four of you were present; isn't that right? A. That is true.

Q. Would it surprise you to know that that meeting was held on November 7, 1939? A. No, sir, it wouldn't surprise me.

Q. You might be a year off in the date that you testified to here Friday, might you not? A. Yes, sir, that could be.

Q. Now, if it were in November, 1939, that would be very shortly after the time when you tried to buy
5414 board from Ebsary, wouldn't it? A. Well, it would be right close. I couldn't tell you whether it would be right after or before, Mr. Bromley. If it were in the fall of 1939, that was about the same time that we were negotiating with Ebsary.

Q. Can't you remember now whether the conversation was in the fall of 1939, or the fall of 1938? A. I have been under the impression that it was the fall of 1938, but if you say it was in the fall of 1939, I would be willing to take your word for it.

Q. I do say so. A. All right, sir.

Q. You testified to this meeting in the criminal case, didn't you? A. Yes, sir.

Mr. Bromley: May the witness be shown the testimony at the criminal trial, please?

(Testimony handed to the witness.)

By Mr. Bromley:

Q. Will you turn to page 2531 of your testimony at the criminal trial? A. Yes, sir.

Q. When you testified about that meeting among the four of you, on Friday, you added something which you had not mentioned in the criminal case at all, do you recall that? A. No, sir, I don't.

5415 Q. Do you recall that you told us the other day that you offered to let USG look over the Cardiff books? A. That is right.

Q. Now, you know you didn't say anything of that kind in the criminal case at all, don't you? A. I don't know, sir.

Q. Well, can you find any such reference in your previous testimony in the criminal case? A. Do you want me to read it and see?

Q. I want you to look at it and tell me whether it is there or not. A. I have read up to page 2535, which seems to be the end of it, and it isn't there.

Q. Isn't it a fact that this Mr. English, whom you said was a Director of the company, came in that meeting somewhat accidentally, and was only there for a very few minutes at the last of it? A. I am sure I don't know how he came there. I was introduced to him there. I remember that that was the first time I had ever met him.

Q. Don't you remember that he came in well toward the end of the meeting? A. No, sir, I don't remember that.

Q. Is it your recollection that he was there all
5416 the time? A. My recollection is that he was sitting over on a sofa near a window, just sitting and listening to the conversation, without taking any part in it.

Q. Was he there all the time? A. That is my recollection.

Q. Now, after you got through saying what you said you said to Mr. Knode, didn't Mr. Knode tell you that he knew little, if anything, about your business policies? A. I don't remember him saying that, Mr. Bromley.

Q. Didn't he tell you that he had no interest in your business policies then, or at any other time, and was not interested in telling you how to run your business? A. No, I don't believe he said anything like that. I think I would remember it if he had.

Q. Don't you remember that he told you that as he understood it, neither he nor anyone else from USG had ever suggested what you should do about your business,

or complained to you about Cardiff's activities, and you told him that that was right? A. No, I have no such recollection.

Q. Now, wasn't the subject of the Wasem Plaster Company mentioned at this meeting? A. I believe it was.

Q. And wasn't it mentioned by Mr. Knode, who told you that you must realize that it wouldn't be good
5417 business for USG to sell to another distributor in Fort Dodge, when it was already doing business with the Wasem Company which was located there? A. No, sir, that was not raised as an objection against doing business with us at that meeting, or at any other time that I talked with officials of the USG.

Q. Do you say that you mentioned the Wasem Company? A. Yes, sir, I think I did, in pointing out that it wasn't a fair proposition to be selling board and lath at a discount to a man across the tracks from us, and to refuse to put us on the same basis.

Q. You remember, don't you, in connection with that, that Mr. Knode told you he did not consider either you or the Cardiff Company to be an outlaw in the business? A. That is right.

Q. Wasn't that statement made in connection with your remark to him that you thought USG considered Cardiff to be an outlaw in the industry? A. That is right, that they had been treating us as an outlaw—correct.

Q. And Mr. Knode said that USG did not consider your company to be an outlaw at all, didn't he? A. That is correct, he said that.

Q. And didn't he follow that remark up by saying, "Of course, I don't see how it would be good busi-
5418 ness for us to sell you, with Wasem being located as it is."? A. No, sir, he did not. What he said was that they weren't making any more deals like that.

Q. Didn't he say a little more than that? A. Yes, he said the Wasem deal was an old deal, and that they weren't going to make any more like it.

Q. Didn't he tell you that at that time, there were only a few of these consents to sell manufacturing distributors outstanding, and that it was the policy of USG not to extend these consents to new companies? A. No, he didn't put it that way. He said that the deal with Wasem was an old deal, and that they weren't going to make any more like it.

Q. Well, you testified about this at the criminal trial, didn't you? A. Yes, sir.

Q. Will you turn to page 2559? A. Yes, sir.

Q. Do you see in line 3 that you answered in the affirmative my question:

"Q. Now, didn't Mr. Knode or Mr. Keady or Mr. English, one or all of them, tell you that it was the policy of the company, carefully considered, not to put any more distributors into business?"

That is right, isn't it, that is what he did say?

5419 A. Isn't that the same as I just said, that the deal with Wasem was an old deal, and they weren't going to make any more like it?

Q. Perhaps it is.

You made some statement here the other day to the effect that you said that USG had granted a consent during this period to sell some other plaster manufacturer. Do you remember that? A. I did. I said that I understood that during this same period they were talking about, that I was talking about, that they had granted a consent to somebody else.

Q. And you told us that you brought that to Mr. Knode's attention, but did not mention the name of the company that you had in mind? A. Yes, sir.

Q. Now, the name of the company that you had in mind was the Mathieson Alkali Company, wasn't it? A. Yes, sir.

Q. And you intended by that reference to charge Mr. Knode with an inconsistency, didn't you? A. Yes, I wanted to point out that he wasn't giving us the usual treatment that independents in the industry had been receiving.

Q. And you wanted to suggest to him that when he said it was the company's policy not to grant new con-

5420 sents, that he wasn't telling the truth, because during that very period you say USG had granted a consent to somebody to sell Mathieson. Isn't that the purpose of your testimony that you gave here Friday? A. The purpose of my testimony was to tell what I recollected. The purpose of that question at that time was to point out to him that maybe he wasn't treating us the same as he had treated others.

Q. Did you hear Mr. Dolan testify in the original trial? A. No, sir.

Q. You know who Mr. Dolan is, don't you? A. No, sir.

Q. Don't you know him to be the Sales Manager of the Mathieson Alkali Company during this period? A. No, I don't know Mr. Dolan.

Q. Did you know anything about the Mathieson Alkali Company at all? A. No, sir.

Q. Did you know where their plant was located? A. It was my understanding that they had acquired a plant that was located at Plasterco, Virginia.

Q. That was a plaster plant, wasn't it? A. That was my understanding, yes, sir.

Q. And USG had a board plant right near there,
5421 didn't they? A. That was my understanding.

Q. And you knew from talk in the trade, didn't you, Mr. Sensibar, that USG had been furnishing board to the Mathieson Alkali Company for 6 to 9 years prior to your conversation with Mr. Knode? A. No. My understanding was, at that time, that the Mathieson Alkali Company had just acquired that plant, shortly before this conversation, sometime during the depression.

Q. Mathieson Alkali had been in business for how many years, do you know? A. I don't know, the Alkali Company is old, I guess. But it is my impression that they had acquired that plant, which I understand that Certain-teed had operated before, during the depression.

Q. Wasn't it your information, regardless of where their plant was, that USG had been giving them their board for many, many years prior to that conversation? A. No, sir, it was not.

Q. Didn't Mr. Knode point that out to you, in this conversation, that that was hardly a fair statement to make in view of the fact that Mathieson was an old customer of USG? A. No, because the thing wasn't discussed. He simply refused to enter into any discussion on it.
5422 As I told you; I hadn't mentioned the name Mathieson, and I don't think there was any discussion whatever about it.

Q. You were asked about this very subject matter at the criminal trial, weren't you? A. I was, yes, sir.

Q. Now in this meeting, didn't you tell Mr. Knode and Mr. Keady that what you wanted to do was to submit this matter to the Federal Trade Commission? A. No, sir.

Q. And don't you remember that Mr. Knode told you he didn't believe it was a matter for the Commission, but that, rather, it was a question of USG's legal rights under

its patents, and that he believed the company was within its rights under those patents? A. No, sir, that was not the conversation at all. I suggested to him that since we had been trying to get things changed for years, and had failed, and since it was important to us, and from our point of view a great injustice to us, and since it might have some legal aspects, why didn't we go to Washington and place it before the proper people to get some sort of an opinion on it, without going to any trouble about it—by which I meant legal trouble. He simply brushed that aside, and said there was nothing to that at all.

5423 Q. And that is all he said, is it? A. I am quite sure that that is all he said, yes, sir.

Q. You told us next about the conversations that you had with Baker and Burley of the National company, in 1936, 1937 and 1938; and you testified about these conversations in the criminal case, do you remember? A. Yes, sir, I testified about them.

Q. Will you turn to page 2538 of your testimony in the criminal case? A. Yes, sir, I have it.

Q. Now, you left out of your testimony here, the other day, what you said in the criminal case, didn't you, to-wit, that you told Baker that what you wanted him to do was break his contract with USG and go ahead and sell you? A. What happened was this—

Q. (Interposing) Now wait a minute. That is what you testified to in the criminal case, isn't it? A. I don't think so.

Q. You don't? A. No, sir.

Q. You didn't testify to that here the other day, did you? A. Well, now, I will tell you exactly what happened.

Q. Can't you answer the question? A. Well, I take it what you want is the truth. If you want the whole truth, I will tell you the story.

5424 Q. Can you answer the question? A. Will you repeat it, please?

Mr. Bromley: Will you read it?

(The record was read by the reporter.)

The Witness: I can't tell you now just exactly what I said about that. When Baker told me—

By Mr. Bromley:

Q. (Interposing) You can't tell me now what you said in this case about that, can you? A. I can't tell you word for word.

Q. And you don't remember what you said in the criminal case, do you? A. I remember pretty well what I said both times, but I can't tell you word for word what I said either time.

Q. Now, the fact is that although you didn't say so here the other day, you suggested to Baker that he break his contract with USG and give you board, didn't you? A. No. What happened was that Baker finally told me that USG wouldn't give him permission, or didn't give him permission, and I said to him, "Why don't you go ahead and sell us anyway, and let's cross that bridge about permission when we get to it?"

And he said, "I think I could do that if I would be willing to make an issue of it, but I don't want to make an issue of it."

Q. When you said, "Why don't you go ahead and
5425 sell us anyway", weren't you suggesting that he break his contract wth USG? A. Mr. Bromley, that is entirely a legal matter. I wasn't interested in the contractual relationship between Mr. Baker and USG. I was interested in getting what our company needed. Mr. Baker had said he wanted to sell us, and Harrison had said that also, and I was interested in getting that board. So far as their relationship was concerned, that could take care of itself.

Q. Well, in 1938, you told us on Friday, you had a talk with Mr. Keady of the USG Company about whether or not USG would grant consent to National to sell. Do you remember that? A. Yes, sir.

Q. You testified about that conversation in the criminal case, didn't you? A. I think I did.

Q. Will you turn to page 2546? A. Yes, sir.

Q. Do you see that all you said there was that you talked to Mr. Keady about USG's consent to National to sell Cardiff, and Keady simply said that USG had made up its mind and saw no reason to change it? A. Yes, I see that.

Q. And that is all you said about that conversa-
5426 tion in the criminal case, isn't it? A. That is all that appears here.

Q. Now, here the other day you said that Mr. Keady asked a number of questions about your company and its organization. Do you remember that? A. Yes, sir.

Q. And that you pointed out to him the benefits to be derived for USG and the entire industry if Cardiff was given a supply of gypsum board. Do you remember that? A. Are you repeating my words?

Q. Yes, I am summarizing your words. Do you want to look at it? It is page 5582. A. No, I am perfectly willing to take your word for it.

Q. Did you say that to Mr. Keady? A. Yes, I had such a conversation with him.

Q. And you told us here that you also added that it was not healthy for a large company to hold down a small competitor, do you remember that? A. That is right.

Q. You didn't mention that in the criminal case, did you? A. It doesn't appear here, no, sir.

Q. And you said here the other day that you told Keady that you had adhered to the sales practices estab-
5427 lished by USG for 3 years, with the exception of truck deliveries out of Fort Dodge? A. Yes, I told him that.

Q. You didn't say anything like that in the criminal case, did you? A. I don't recollect that I was asked about the details of that conversation, and this page you directed me to here doesn't show that I was asked about the details of that conversation.

Q. Does it show that you were asked any question at all? A. Yes, the question is: "What did Mr. Keady say?". I told what he had said, that they had made up their minds, and that was that.

Q. You don't think that that was a question that asked you to tell what the conversation was? A. Well, I have just told you.

Q. So in the criminal case, you were just giving what Mr. Keady said, but deliberately leaving out what you said; is that it? A. No, that isn't correct at all.

Q. Well, you said the other day that when you said to Keady that Cardiff had been following the USG sales practices for 3 years, you said, "If we can obtain board, we will be willing to give up that sales practice"—do you
5428 remember testifying to that? A. Yes, sir.

Q. Now, you were proposing to Keady, weren't you, that if he gave you a supply of board, you would agree to restrict the nature of Cardiff's business practices? A. I was talking about that one item of truck deliveries. USG

had a practice at that time, if I recollect rightly, of making deliveries by truck out of their plant at Fort Dodge to just a few surrounding counties; whereas, we made deliveries by truck to a much larger area; and I told him that if that was an objection, if they would be willing to let us have the board we would conform to the same trucking practice that they had.

Q. And don't you remember that Mr. Keady thereupon promptly told you that the mere proposition which you had made to him prevented him from supplying you with board, because any such arrangement as that would be illegal? A. I am positive that he didn't say anything like that.

Q. Didn't you know that any such arrangement as that would have been illegal? A. No, sir.

Q. You didn't know that? A. No, sir.

Q. You said you talked to a Mr. Wright from
5429 the Texas Company? A. Yes, sir.

Q. Who was Mr. Wright? A. Mr. Frank Wright was the Traffic Manager of the company, according to my understanding.

Q. Now when you spoke to him, you knew that it wasn't possible to make any feasible arrangement between two plants, such as Cardiff and Texas, nearly a thousand miles apart, didn't you? A. No, sir—there are two questions in that question.

Q. Answer one and then the other. A. You asked me whether I knew it wasn't feasible. First of all, it may have been feasible. I couldn't very well know it wasn't feasible. A thing like that, Mr. Bromley, requires a pretty careful study of freight rates, and where your customers are. For illustration, freight rates—

Q. (Interposing) I don't care for any illustration, Mr. Sensibar.

Mr. Steffen: May he answer the question fully?

Mr. Bromley: I object to his continuing to answer the question, on the ground that it is not responsive.

Justice Stephens: The objection is sustained. You may bring it out on re-direct-examination, if you think it is material to the Government's case.

By Mr. Bromley:

Q. In each of the instances that you have testified
5430 to with respect to your talks with manufacturers, isn't it true that each one of them stated that it

wanted to sell board to Cardiff if it could?

The Witness: May I have that question repeated, please?

(The question was read by the reporter.)

The Witness: Well, there were certainly officials in each of these companies who told me that they did, yes.

By Mr. Bromley:

Q. And didn't all of them tell you that USG had refused to grant the necessary consent? A. Yes, I think they all finally did.

Q. And you feel, don't you, now, and have felt at all times, that each of the manufacturers that you approached acted in entire good faith in the matter? A. I have never had any occasion to question that.

Q. And you feel that each one of these companies, like National and Ebsary and the others, really tried to see if they couldn't supply you with board, don't you? A. Yes; some tried harder and maybe some not quite as hard, but I think they all did try.

Q. Now, isn't it, however, true that except for Ebsary in 1939, you have no knowledge as to whether any one of the others actually did request USG's permission to sell Cardiff? A. Well, with the possible exception of National, during my talks there with Mr. Keady.

5431 Q. You mean by that that you have no knowledge as to whether any licensee actually applied for permission, except Ebsary and possibly National? A. That is right.

Q. No one of the licensees—not even National—except Ebsary ever told you that they had applied in writing to USG for permission to sell, did they? A. I think that that is correct.

Q. And so far as you now know, each one of these companies which you approached might have had their own reasons for not wishing to sell your company; isn't that right? A. Well, sir, a company is made up of a lot of individuals, Mr. Bromley, and in each of those companies there might have been some people who didn't want to sell us; but when the official representative told me that they had tried, I did believe him.

Q. Now, won't you answer the question as I asked it, please? A. I am afraid I have forgotten the wording.

(The question was read by the reporter.)

The Witness: I think the companies did wish to sell us. As I said before, there might have been individuals in those companies that didn't, but I think that the companies, as a whole, wished to.

Mr. Bromley: That is all.

5432 Justice Stephens: Is there any other cross-examination?

Mr. Johnston: Yes, if the Court please.

Justice Stephens: Very well, Mr. Johnston.

Mr. Johnston: The testimony of this witness to which I am about to refer commences on page 5604 of the record.

Cross Examination

By Mr. Johnston:

Q. I believe you testified that Mr. Wright, of the Texas Company, was the only person connected with that organization with whom you talked about board or lath? A. Yes, sir, I did.

Q. And that you had several conversations with him? A. That is right.

Q. Extending over a period during 1937 and 1938—right? A. That is right, or maybe a little later than that, too.

Q. And that you talked with him as often as every 3 or 4 months? A. That is right.

Q. Now, will you give us the place and the date of any conversation you had with him?

Justice Stephens: Before you answer that, I must have misunderstood you. What page did you give?

Mr. Johnston: Page 5604.

5433 Justice Jackson: That is the testimony you are talking about, that isn't where he started his testimony?

Mr. Johnston: That is the testimony I am talking about, in connection with the Texas Company.

Justice Stephens: Read the last question.

(The pending question was read by the reporter.)

The Witness: Mr. Johnston, the nearest I can come to that is to tell you that it was at the traffic meetings of the Gypsum Association, at whichever ones Mr. Wright attended. I recollect one of those meetings, I believe, was in Cincinnati. They were at different places.

By Mr. Johnston:

Q. When was that meeting? A. I couldn't place the exact date for you.

Q. You don't even know the year? A. I should say 1938 or 1939.

Q. Well, your testimony the other day stated '37 or '38. Are you changing it now to the next year? A. I wouldn't like to be pinned down to the exact year, Mr. Johnston. I simply don't remember.

Q. The fact is you just don't know specifically about any meetings, anywhere, at any time, that you attended and talked to Mr. Wright, do you? A. Yes, sir, I know that we attended a number of those meetings together,
5434 and discussed this board thing at most of those times we were together.

Q. And the Cincinnati meeting is the only meeting that you can specifically fix, and you now think that was in 1939? A. I think I said it was in 1938 or 1939.

Q. 1938 or 1939? A. That is my recollection.

Q. And that is the only meeting? A. I can remember meeting with him other times, but I can not tell you precisely in what city or at what hotel. We had meetings in St. Louis, Cincinnati, Chicago, and Buffalo, over a period of years. There were other meetings when we didn't talk about this. It is pretty hard to pick out of a person's memory the exact place and date that a particular conversation was held.

Q. You can, therefore, remember what you and Mr. Wright talked about, but you can't tell when it was or where it was? A. Well, it is much easier to remember exactly what a person talked about—

Q. (Interposing) Just answer my question. A. (Continuing) —in this case, than it is to tell you exactly where it was—

Q. (Interposing) I don't want any explanation. I want you to answer my questions.

Justice Stephens: Mr. Sensibar, you are falling into the habit of arguing the reasonableness of your answers
5435 with counsel instead of answering questions.

The Witness: I am sorry.

Justice Stephens: You shouldn't do that, because it takes up time. If counsel for the Government feel that your answers need explanation, they have a right to ask you questions on re-direct examination. It is for them, as officers of the Court and counsel for the Government, to decide what

testimony is necessary in their case, not for you. When you proceed to argue or explain these answers, you are assuming their function.

I don't say that as criticizing you, but to explain; and so far as you can accurately do so, you should answer just the questions that are asked you, not argue your reasons.

The Witness: I will try to do so.

Mr. Johnston: Read the question.

(The pending question was read by the reporter.)

By Mr. Johnston:

Q. Is that right? A. I think that that is correct, except for that Cincinnati meeting.

Q. On page 5605 of the transcript, you were asked this question:

"Q. When did you first contact Mr. Wright concerning the purchase of board and lath?"

5436 You were talking about board and lath. Then you were asked the question:

"Q. Will you tell us the conversation that you had with him?"

And I read from your answer, or give the substance of it, and let us see if that is correct. You said that it was "not a very economical proposition, not very sound economically, to think about a connection with his company, because their plant was down in Texas, and the freight absorption to most of our customers would be great; in other words, the freight from his plant to our customers would be larger, on the average, than the freight from our plant to the same customers, who, of course, wouldn't pay any more for the product."

Now that is correct, isn't it? A. Yes, sir.

Q. Did you know who Mr. Wright was at that time? A. I understood him to be the Traffic Manager of the Company.

Q. He merely handled freight matters, didn't he? A. I didn't know exactly what he handled. I knew he did handle freight matters.

Q. You didn't know that he was anything else than a rate clerk, did you? A. Yes, sir, I understood at the

5437 time that he was a man in the confidence of the company.

Q. That he was what? A. A man in the confidence of the company.

Q. In the confidence of the company? A. Yes, sir.

Q. Who told you that? A. I can't remember that. That was my understanding.

Q. Did anybody tell you that he handled anything else than freight matters? A. I can't say, Mr. Johnston.

Q. Then you testified further that in these several conversations, each time you would talk to him he would say that he would take it up, and the next time you would see him he would tell you that he would take it up and let you know? A. Yes.

Q. Now, that is the extent of your negotiations with the Texas Company regarding board and lath, isn't it? A. Substantially, yes.

Justice Stephens: The Court will take the morning recess at this time.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

Justice Stephens: Proceed, Mr. Johnston.

By Mr. Johnston:

5438 Q. I believe you testified that this Cardiff Company had some financial difficulties along about 1934; is that correct? A. 1935, yes, sir.

Q. And that it went into bankruptcy in 1935? A. That is right.

Q. And at that time, you were a stockholder? A. That is correct.

Q. How much stock was outstanding in that company at that time? A. You refer now to the company that went into bankruptcy?

Q. The Cardiff Company that went into bankruptcy. A. Yes, sir, that was the Cardiff Gypsum Plaster Company.

It seems to me it had, I believe, 1,000 shares of stock.

Q. Well, it was a $10,000 company, wasn't it? A. Well, sir, I believe that is right. I believe that that is the capital it was organized with in 1896.

Q. February 15, 1896? A. That sounds right.

Q. And when did you first have this financial difficulty in this company that prompted the bankruptcy pro-
5439 ceedings? A. I hardly know what you mean. Are you referring to the three people who petitioned for the bankruptcy?

Q. I am referring to the company. When did the company first have the financial difficulty? A. The company

was hard up for working capital beginning in 1932. 1931 was the last profitable year.

5440 Q. You mentioned, or started to mention, something about three creditors? A. Yes, sir.

Q. What was that? A. I was thinking of the three creditors who signed the petition for bankruptcy.

Q. Then, as I understand it, three creditors of this company filed an involuntary petition in bankruptcy. A. I think that is right.

Q. Against the company? A. Yes.

Q. When did they file that petition? A. Well, my recollection is that it was in January of 1935. Mr. Bromley seems to think it was October of 1934.

Q. And now to refresh your memory, wasn't it in October, 1934, about October 15? A. Well, sir, if that is the record, I will take your word for it, but my recollection is that it was January, 1935, that we went into bankruptcy.

Q. What was your connection with the company at that time? A. I was a stockholder, and I was vice president.

Q. You were the active vice president at that time? A. I wouldn't say that. Mr. Breen was manager of the company.

5441 Q. You were living in Chicago at that time? A. Yes, sir.

Q. And spending some time at Fort Dodge and some time in Chicago? A. That is right.

Q. Then you people came along as directors or officers of the company, after this involuntary petition was filed, and filed a voluntary petition under Section 77-B? A. Yes, sir.

Q. And you think that that was filed along in the latter part of 1934 or the first part of 1935? A. Yes, sir.

Q. And it was under that petition that your reorganization took place? A. That is correct.

Q. Do you know what your debts were, scheduled and filed, in that bankruptcy proceeding, how much they amounted to? A. Yes, sir.

Q. How much? A. About $91,000.

Q. I believe you testified the other day, in response to a question by Mr. Bromley, that you did not pay those debts in cash, is that correct? A. That we didn't pay them all in cash, that is right.

Q. What you did do was to pay the small miscel-

5442 laneous accounts in cash? A. That is correct.

Q. Now the other debts have never been paid to this day, have they? A. I shouldn't say that, sir.

Q. Well, I don't care what you should or shouldn't say—I am asking you to tell me what the fact is. A. The other creditors took stock in the reorganized company. Well, let me give it to you more accurately. My recollection is that all accounts under $300 were paid in full, and that on the larger accounts they got $300 in cash, and the rest in stock of the new company.

Q. How much in stock, altogether, was issued to them? A. I believe they got half of the stock of the reorganized company, and I might say that a large part of that $91,000 owed was owed to Ezra Sensibar.

Q. You were a principal creditor? A. I was, yes.

Q. How much was paid in stock outside of what you got? A. It seems to me that my advances to the company had been—

Q. (Interposing) Wait a minute. Did you understand my question? I am not inquiring about you, I am inquiring about the amount of stock that the creditors other
5443 than yourself got. A. I am trying to think it through —I believe that my advances were $30,000 odd, out of a total of $90,000, or out of the $91,000, so that I got a little better than one-third of the stock that was given to creditors. The remaining $50,000 in creditors got the other two-thirds.

Q. That is, $50,000 in volume of debts got how much stock? A. Got two-thirds of half the stock of the new company.

Q. I know, but how many shares? A. The new company was reorganized with three hundred shares of stock.

Q. What par value? A. No par value.

Q. It was a no-par-value stock? A. I think it was no par value, Mr. Johnston.

Q. All right. A. And half of that went to these $90,000 of creditor claimants.

Q. That would be 150 shares? A. That is right.

Q. Representing how much indebtedness? A. About $91,000.

Q. Then is it fair to say that there was $91,000 of indebtedness of that company that has never been paid? A. Paid in stock—

5444 Q. (Interposing) Other than by this stock? A. That is correct. Well, that is not right, because the small claims were all paid off, and, as I said, $300 was paid on the larger ones. All of that came off the $91,000, if I remember right.

Q. Would you say that it was fairer to say that there

is $50,000 of those debts unpaid? A. That was paid in stock?

Q. Yes. A. Yes, that sounds all right.

Q. Now there was a substantial loan against this company at the time it went into bankruptcy, wasn't there? A. Yes, the advances that I had made to the company.

Q. You had negotiated those loans through your Chicago connections? A. No, sir.

Q. How did you do that? A. I simply advanced the money to the company.

Q. They were your personal advances? A. That is right.

Q. Did you ever hear of a concern by the name of Construction Materials Corporation? A. Yes, sir.

Q. Tell us what that was. A. That was a concern
5445 in Chicago engaged in the production of building materials and the ownership and operation of seagoing hopper dredges.

Q. You were interested in that concern, weren't you? A. I was an employee of it.

Q. Not an executive? A. No, sir.

Q. Who was the financial and executive responsibility of that concern? A. My brother was president of the company, and had built it up.

Q. And you were connected with him? A. With the concern, yes sir, not with him.

Q. Now at about the same time that the Cardiff Company went into bankruptcy, that other concern went into bankruptcy also, didn't it? A. About a year earlier. I can give you that date, it was January 17, 1934.

Mr. Steffen: Your Honor, we have no particular objection to this line of questions, except that it seems to be going rather far afield.

Mr. Johnston: It is not far afield, if the Court please, it is only to bring out the connection that these two concerns had, together, and he is testifying here now about his attempting to go out and establish business relations. I merely want the Court to get the picture—

5446 Justice Stephens: (Interposing) I think we see the purpose of it. I think it is not improper cross-examination. Apparently it goes to the business reasons which the various companies that have been testified about, had in respect to their decision not to sell board to Cardiff. That is what you are developing, Mr. Johnston, is it not?

Mr. Johnston: Exactly.

Justice Stephens: Very well. The objection is overruled.

By Mr. Johnston:

Q. Wasn't that petition filed about the same time the petition with respect to the Cardiff Company was filed? A. No sir, that was filed on January 17, 1934.

Q. That was a reorganization too, wasn't it? A. That company was reorganized, yes sir.

Q. And the debts of that company were not paid? A. Do you want me to go into the details of it?

Q. I just want you to answer my question, yes or no. A. No, they were paid.

Justice Jackson: They were paid, you say?

The Witness: They were paid, some in cash and some in stock, your Honor.

By Mr. Johnston:

Q. How much was paid in cash? A. Well—

Q. (Interposing) Just approximately, if you can
5447 recall. A. Let me think a minute.

Justice Stephens: You can take your time and think about it.

Mr. Johnston: Take all the time you want to. I don't want to destroy any of your processes of thinking at all.

The Witness: I would say that about half a million dollars was paid in cash.

By Mr. Johnston:

Q. And how much in stock? A. To the best of my recollection, about $800,000 or so.

Q. Do the records not show that the liabilities of that company at the time of its bankruptcy were nearly $2,000,000 or more? A. You probably have in mind the claims filed against the company, rather than what the liabilities finally turned out to be. Those claims included one for close to $1,000,000. According to the best of my recollection, it turned out to be a duplicate claim and was thrown out by the court.

Q. Mr. Sensibar, wasn't the stock distribution made on a basis of nearly $2,000,000 in debts? A. No, I don't believe so, I think I have given you the figures.

Q. And you don't know that to be the fact and you were

connected with the company? A. I have given you
5448 the figures to the best of my recollection.

Q. And you were connected with the reorganization, weren't you? A. Yes, I was connected with the reorganization.

Q. And you were connected with it in reference to the reissue of the stock, or rather the issue of stock, for the debts? A. No.

Q. Under the order of the Court under Section 77-B? A. No sir. I had a claim against it, if that is what you mean. I was not the manager of the reorganization.

Q. I believe you testified in response to Mr. Bromley's question that this Cardiff Company never submitted any financial statements to the credit agencies? A. That is correct.

Q. Either before or after the reorganization? A. Yes, that is right.

Q. You were the executive responsible, at least in 1935, from that time on until the present time? A. That is right.

Q. And isn't it a fact that Dun and Bradstreet, at least every year and sometimes oftener, have asked your company to furnish financial statements so that they could put out commercial reports on you? A. Mr. Johnston, from time to time we have been receiving those circular requests of Dun and Bradstreet.

5449 Q. And you have always refused to respond to them? A. To furnish a statement, that is right.

Q. Don't you know, Mr. Sensibar, that any prudent businessman, in considering the establishment of business relations with a concern, would look up its financial credit and standing and rating? A. Yes.

Q. That is common business practice, isn't it? A. Yes, it is.

Q. And isn't Dun and Bradstreet the established credit agency of this country today, to which businessmen go for that information? A. Yes, we have no fault to find with Dun and Bradstreet.

Q. Well, that is a fact, isn't it? A. That is right.

Q. And yet you would refuse, year after year, and still refuse, to furnish any financial information, give any business report or financial statement of your business, to this or any other agency. That is right, isn't it? A. Yes. Is there anything wrong about that, Mr. Johnston?

Q. I am just asking you for the facts. A. That is right.

Q. Now, did you ever have any information, or receive any reports, of how your concern was regarded in
5450 the business world from a financial standpoint, as to its financial responsibility? A. We had a pretty good idea, yes.

Q. It was pretty bad? A. No sir, I am sorry to say that that was not the case. It was pretty good. After 1935 we had no difficulty in buying supplies. We had credits that ran as high as $10,000 or so, established, for purchasing purposes.

Q. Can you name any business concern during 1935, 1936, 1937, 1938, or 1939, with whom you had a credit of $10,000? A. Yes, I can.

Q. Who? A. The St. Regis Paper Bag Company.

Q. Wasn't there a guarantee behind that account? A. No sir. We also had a line of credit at a bank in Fort Dodge that ran over $20,000, and there was no guarantee behind that.

Q. When was that credit established? A. About 1940.

Q. But prior to 1940 you didn't even have a credit rating with the bank there of as much as $2000, did you? A. Yes sir, we did.

Q. Wasn't $1000 your limit? A. We had a good deal more than that. No, $1000 wasn't the limit.

5451 Q. During this period from 1935 on, were you ever sued on any of your accounts? A. I don't believe so. We paid our bills promptly, as far as I can remember.

Q. Did you do any business with the Viking Automatic Sprinkler Company? A. Yes.

Q. What did you do there? A. What was that?

Q. What business did you do with them? A. They installed a sprinkler system throughout the plant.

Q. That was on a contract? A. That is right.

Q. You paid it out in monthly payments? A. That is correct.

Q. Where they retained the title to the system? A. That is correct.

Q. And when you would buy other equipment of any other character, you would have to buy it on time and pay it out in small payments, wouldn't you? A. No, that is not correct.

Q. And either give a chattel mortgage on it or have it put in under a title contract? A. No, that isn't
5452 correct. We made a packer installation that cost

us about $15,000, in order to take care of increased business, and there wasn't anything such as you suggest involved in that. We paid for it all in cash without any extension of time.

Q. Now, you said something about your salesmen, in response to a question by Mr. Knuff, I believe, that you worked salesmen over an area out through the Middle West? A. We did.

Q. How many salesmen did you work after the reorganization? A. I think the most that we had was eleven.

Q. When did you first have eleven? A. I should say in about 1939 or 1940.

Q. Isn't it true that up until 1940, or about that time, you only had two salesmen? A. No sir, that is not true.

Q. And when you started, after your reorganization, you only had one for a time, and then for a long time you only had two salesmen? A. No, that is not the case. When we reorganized, we started right away with three men, and we kept adding to that organization as we could.

Q. Do you know who D. N. Kelliher is? A. Yes sir.

5453 Q. Who is he? A. He is an attorney in Fort Dodge.

Q. Did he ever bring a suit against your company? A. Yes, he did.

Q. On an open account for $480? A. No.

Q. For how much? A. I think you have the amount right, but it wasn't an open account.

Q. What was the nature of the claim? A. It had to do with the claim of a man who had been selling for the compan,, not a customer of the company or anyone we bought from.

Q. Now when was that? A. About August, 1942.

Q. So that as late as 1942, you were still having some difficulties or controversies about your indebtedness? A. No sir.

Q. And isn't it true also that all through that period you were either threatened with suits, or that your accounts were slow, and generally throughout the business world where you were known, you were considered a poor credit risk? A. During the period we paid our bills promptly, our credit was good, and we had no difficulty in buying, Mr. Johnston.

5454 Q. In small quantities? A. Or large quantities, for the size of our company.

Q. Do you think, Mr. Sensibar, as a good businessman, that after this reorganization the financial condition of this Cardiff Company was such that it should merit the favorable consideration of establishing business relations with other business concerns? A. Yes, it not only should have merited it, but it did merit it, and business relations were established with everybody, except in the case of board.

Q. Except with these people that you wanted to do business with? A. That is right.

Mr. Johnston: That is all.

Justice Stephens: Is there any further cross-examination?

Mr. Adams: Yes, your Honor.

Cross-Examination

By Mr. Adams:

Q. Mr. Sensibar, you were interested in doing business with Certain-teed? A. We were, yes sir.

Q. And did you feel that the old management would not do business with you? A. No, we did not.

Q. You never took that matter up with them, did you?

A. Yes sir, I discussed the question first with Mr.
5455 Warren Henley back in 1933.

Q. Then a new management came in after that? A. Yes sir.

Q. Then you took it up with the new management? A. Yes sir, that is correct.

Q. You knew that the old management wouldn't do business with you, is that right? A. No, that isn't right. The old management had told us that they weren't able to.

Q. Then, when the new management came in, you took it up with them, is that right? A. That is right, sir.

Q. You kept yourself pretty well informed about what was going on in the building material business, didn't you? A. I tried to do my best.

Q. And you knew when the new management came in, didn't you? A. Yes.

Q. The new management, as a matter of fact, came in in April, 1936, didn't it? A. I don't know the exact date, I am sure.

Q. Well, you didn't talk to anybody until you talked with Mr. Hartley, did you, in the new management? A. I think that is correct.

Q. And Mr. Hartley didn't come with the com-
5456 pany until 1939, did he? A. Well, now, I don't know the exact date, it was shortly after he came with the company that I made it my business to go and talk with him.

Q. Hadn't you known that there had been a new management in the company since 1936? A. No, I don't believe I have any recollection of that, sir.

Q. But you kept yourself informed about what was going on in the building material business? A. I did the best I could.

Q. And you were anxious to take this matter up with the new Certain-teed management when it came in? A. That is right.

Q. And you have no recollection of the fact that you waited for over three years after the new management came in before you took it up with anybody? A. You are speaking about a management before Mr. Hartley, I take it. I don't remember about that, sir.

Q. Despite your awareness of what was going on in the building business, you have no recollection of that? A. I am perfectly willing to admit having overlooked some good bets, if that is what you mean.

Q. You knew when the Browns were in control of the Certain-teed Company, didn't you? A. I never met
5457 the Browns.

Q. Will you answer the question, please? A. I had heard of them.

Q. You knew when they retired from the business, too, didn't you? A. It seems to me I read about that in the papers.

Q. And that was in 1936, wasn't it? A. I don't remember.

Q. Mr. Sensibar, isn't it a fact that when you got around to asking questions of Certain-teed, the only purpose of asking those questions was so that you could build up a record for bringing a lawsuit? A. No, that is definitely not the fact.

Q. Wasn't it your motive at that time to cover them simply so you could say that you had covered everybody in the building material business? A. That is not the fact, and further—

Q. (Interposing) That is all, you have answered my question. A. Just a minute, if you want the whole truth—

Mr. Steffen: (Interposing) Go ahead and answer it.

Mr. Adams: Please, I asked the question, your Honor, and if they want to ask any further questions—

Justice Stephens: (Interposing) That may be brought out on redirect. The question has been answered.

5458 Is there any further cross-examination?

Mr. Bromley: I did want to ask one question, because I am told I asked the witness a question and didn't get an answer.

Justice Stephens: You may do so.

Cross-Examination (Resumed)

By Mr. Bromley:

Q. Didn't Mr. Knode or Mr. Keady or Mr. English in your conference with them, tell you that it was the policy of the United States Gypsum Company, carefully considered, not to put any more distributors into business? A. The answer they gave me was substantially like that.

Q. And you were asked, and answered in the affirmative, in the criminal case, this question, weren't you?

"Now, didn't Mr. Knode or Mr. Keady or Mr. English, one or all of them, tell you that it was the policy of the company, carefully considered, not to put any more distributors into business?"

A. Isn't that the same as what you just asked?

Q. Well, do you think it is? A. It seems to me it is, yes sir.

Q. Well, at any rate— A. (Interposing) They told me substantially that, that the Wasem deal was old and they weren't making any more like it.

5459 Q. But the question I asked you is—didn't they tell you that it was the policy of the company, carefully considered, not to put any more distributors into business? A. In substance, yes, the same thing.

Q. They did tell you that, is that what you mean? A. In substance, yes. I don't know the exact words.

Mr. Bromley: That is all.

Justice Stephens: Is there any redirect examination?

Mr. Steffen: Yes. Will the reporter please repeat Mr. Adams' last question, which the witness should have been permitted to answer.

Mr. Adams: I object to counsel's remark, and ask that it be stricken, the Court having ruled that the continuation of his answer was not proper.

Justice Stephens: I don't think that that characterization was necessary, Mr. Steffen. The Court had ruled that

he had answered the question and that if you desired to bring out anything further, it might be done on redirect.

Mr. Steffen: I certainly didn't mean to reflect on the Court. I thought it was odd for Mr. Adams to ask a question and then turn around and walk back and not be ready to listen to the answer.

Justice Stephens: The rule is, on cross-examination, that if a question is answerable by a direct answer it must be so answered. Then, if counsel on redirect wish to
5460 bring out more to explain it, they may have that opportunity. Now that question was clearly answerable, as it was answered, without the volunteered explanation.

But you may ask it now, freely.

Read the last question which Mr. Adams asked.

(Whereupon, reporter read the record as requested.)

Justice Stephens: If you wish to make some further explanation of the answer you may do so, if you understand the question. If you want further questions read back, so that you are entirely clear what it was about, you may have that done also, Mr. Sensibar.

The Witness: No, I understand it. I was about to say, your Honor, that I devoted a great deal of time during that period to working out an arrangement with a company known as the Standard Lime and Stone Company, for the supply of lime on a manufacturing distributor basis to a number of gypsum companies, of whom Certain-teed was one. They appreciated very much the work I had done on that matter and were very complimentary and thankful for what I had done, and I am positive that there was no question in their minds about the sincerity of this proposition about our needing board and lath.

Mr. Adams: I respectfully move to strike out that portion of the answer dealing with their being no question in their minds about the sincerity of his motives, as being a pure speculation, and moreover, a matter of conclusion of the witness.

5461 Justice Stephens: Whose mind do you mean, Certain-teed's?

The Witness: The mind of Mr. Hartley and Mr. Miller and Mr. Stedman, from our conversations, from what they told me, and from what I told them.

Justice Stephens: That may go out.

Mr. Steffen: I would like to say a word on that, your Honor.

Justice Stephens: Well, I paused in order to give you an opportunity to say a word, but you didn't take that opportunity, so I thought you were ready for a ruling. You may be heard.

Justice Jackson: Did the witness answer that question? It doesn't seem to me as though he has anwered it. It doesn't seem to me that he explained what his original answer was. There was a direct question there, asking whether or not he was "cooking up" a lawsuit.

Justice Stephens: He said "No" to that.

Justice Jackson: Then I thought he was going to explain it.

Justice Stephens: Let us hear the argument first on the motion to strike that portion of the answer which says that there was no question in the minds of Mr. Hartley and others of Certain-teed with whom he talked, as to the sincerity of his approach, or words to that effect. What is your contention on that, Mr. Steffen?

Mr. Steffen: The argument is that Mr. Adams
5462 was making a charge, in effect, that Mr. Sensibar was "cooking up" a lawsuit, and he replied by explaining the occasion of his visit; that he had these other matters with regard to procuring a lime connection for Certain-teed, and that he, Mr. Sensibar, had no doubt in his mind that Mr. Hartley and the other officers of Certain-teed felt that he was sincere.

Now that goes to the attitude of Mr. Sensibar as to what he understood.

Justice Stephens: Well, I didn't understand him to make that answer. I thought he said that there was no question in their minds.

Go back to the beginning of this, Mr. Reporter, go back to the question preceding the one which Mr. Adams last asked and read through the record.

(Whereupon the reporter read from page 5748, line 9, to and including page 5751, line 21.)

Justice Stephens: My colleagues are of the view that that portion of the answer ought to stand. I think it is a pure conclusion myself, but I defer to their views.

Mr. Adams: May I move to strike out the whole answer as immaterial.

Justice Stephens: Well, I should think it would not be immaterial, Mr. Adams. It is redirect examination as to the reasonableness of the witness's testimony concerning

his reasons for approaching Certain-teed for board.
5463 That motion is denied.

Redirect Examination

By Mr. Steffen:

Q. There is one item, Mr. Sensibar, concerning the Mathieson Alkali Works, which I would like to ask you about.

I believe you testified that you understood their plant was at Plasterco, is that correct? A. That is my understanding.

Mr. Steffen: May it be stipulated here that the plant of the Mathieson Alkali Company was at North Holston?

Mr. Bromley: Yes, it is the same thing. I mean by that that both towns are very close together, in Virginia.

Justice Stephens: Very well, that stipulation may be shown.

Mr. Steffen: We would now like to offer physically the entire testimony of Mr. Sensibar on the criminal trial, beginning at page 2493 to and including page 2503 of Volume 18, and, I think, from page 2514 to page 2596, inclusive, of Volume 19 of the criminal transcript.

We offer that with the idea that the Court has been asked to make various comparisons between the testimony here and the testimony at the criminal trial, and we offer it in order that the Court may have the matter fully before it.

Mr. Bromley: That is objected to as immaterial and incompetent.

Justice Stephens: How many pages does that involve?

5464 Mr. Bromley: About 100.

Mr. Steffen: I would estimate it at 92 or 93, your Honor.

Justice Stephens: Judge Garrett and I are of the view, Mr. Steffen, that that is an irregular offer to put in that entire 100 pages or 93 pages of the examination.

In the first place, much of it not may be relevant or material to explaining the witness' cross-examination, and if it isn't, then we have got into the record, at the expense of both sides, and at the expense of the time of the Court in examining it, a great deal of unnecessary material.

In the second place, it puts the burden upon the Court to sift out, without the aid of counsel on both sides, in the course of an open examination, what is relevant and what isn't, and it leaves the record without any explict indication

of what the Court has treated as relevant and not relevant, or material and not material, to the cross-examination.

We therefore reject that offer of that entire record. We do not, however, forbid you, if you wish to do so, to examine at as much length as you think necessary, into any other phase of the criminal testimony, or rather the testimony given by this witness at the criminal trial, which you think might clear up the answers which he has made on cross-examination.

But it must be done by counsel on redirect, and perhaps also recross, rather than have it put into the record in that wholesale fashion, because that would leave an ap-
5465 pellate court without any understanding as to what we had considered or had not considered as relevant and material and proper re-direct.

Mr. Steffen: Then, your Honor, I would like to have leave to at least select the passages that were brought up in cross-examination and which Mr. Bromley accused Mr. Sensibar of having dressed up in his testimony here or there.

It seems to me that in order for the Court, in looking over the transcript, to determine anything concerning Mr. Sensibar's testimony on that point, they would have to be advised of the exact matters testified to in the criminal case.

Justice Stephens: That is right, and you are entitled to bring those out. So far the proceeding has gone along in an orthodox fashion, and the reason for the rule of having it conducted in this manner, I have just stated. If you want to pick out additional passages and ask the witness if he didn't also testify to those, and argue to the Court the relevance of those, or bring those matters to the attention of the Court as tending to explain his cross-examination, you, of course, are entirely free to do that, and if you need time to do it we will take a little extra time at noon.

But that is the way it must be done because that is the conventional and orthodox practice, and it is based upon the sound reasons which I stated, that we must have an explicit showing, objectively, in the record of what the Court has considered as relevant and material and proper re-direct.

5466 Do you wish to take the recess now so that you will have a little more time to go over that?

Mr. Steffen: I think we might be able to furnish it to the Court at the end of the recess if we could take it now.

Justice Stephens: What I expect you to do is not to furnish it to the Court, but to call to the attention of the

witness various points in the record which you think Mr. Bromley or other examining counsel ought to have called to his attention, and which you think, if called to his attention, would explain his cross-examination. We are not going to receive in evidence ourselves, without having them put to the witness, these statements, because it is the witness' reasonableness and truthfulness that we are interested in.

Mr. Steffen: My thought, your Honor, was that when the witness was cross-examined by Mr. Bromley relative to what he said in the criminal trial, an impression might be given which, it seems to me, would perhaps be erroneous, and the simplest way of getting at the matter would be to put in the transcript the matters which he actually testified to before the criminal court.

If your Honor cares at all, then, to test the accuracy of Mr. Sensibar's statements, it would be a simple reference to what he actually testified to, and that would end the matter.

I agree that your Honors are right that it would be too voluminous to put in all of this testimony, and much
5467 of it would be irrelevant to the cross-examination.

Justice Stephens: I think if you will go through it, you will find that you will be able to select out those portions which you think were overlooked in cross-examination and which, if called to the attention of the witness, and his recollection refreshed may help to modify his answers, and you can ask him if he had those matters in mind when he was giving his answers. That is the usual way to do it.

We will take the noon recess at this time until the usual time.

(Whereupon a recess was taken at 12:07 p.m. until 1:45 p.m.)

5468 AFTERNOON SESSION

(The trial was resumed at 1:45 o'clock p.m., pursuant to recess.)

Justice Stephens: Mr. Grover calls my attention to the fact that at page 5567, line 15, this morning, I asked the Court Reporter to change the word "concerned" to the word "concerning". Mr. Grover calls my attention to the fact that I am in error in respect of that, because of the use of two "that's" in the previous part of the sentence. The participial form is therefore not appropriate, but the past tense of the verb "concern", and that may be left as it was.

I find, also, that I was in error in indicating, in my announcement of the rulings of Judge Garrett and myself with respect to the manner of conducting re-direct-examination, just at the close of the morning session, that Judge Jackson did not agree with us. I find that he does share our views with respect to the manner of conducting re-direct examination.

To repeat the ruling, the view of the Court is that the proper method of conducting the re-direct-examination, in view of the cross-examination concerning the criminal record, is this,—where the Government feels that an answer given on cross-examination might give a misimpression of the facts because of a failure, on the part of cross-
5469 examining counsel, to bring to the attention of the witness additional portions of the record in the criminal case, the proper practice is for the Government, on re-direct-examination, to bring those portions individually to the attention of the witness and ask him if he had them in mind in answering, and whether or not he wishes to change or modify his answer in any manner. Any other form of examination would deny the Government itself the right of presenting to the Court, through the lips of the witness and through his demeanor, an opportunity to determine what was the correct answer on the whole; and it would also deny to the defendants the right of re-cross-examination, because they wouldn't be aware, if we took either the criminal record as a whole or excerpts therefrom, without presentation of the witness, of what was being considered by the Court as relevant and material and proper re-direct, or of its effect upon the witness' previous answers.

So you may proceed in the orthodox way.

Mr. Sensibar, will you take the witness stand?

Thereupon, EZRA SENSIBAR the witness on the stand at the time of recess, resumed his testimony as follows:

Redirect Examination (resumed)

Mr. Steffen: I want to say simply that the Government's offer was to introduce only those portions of the
5470 criminal transcript to which Mr. Bromley referred, and that largely for the Court's assistance and in order to make the record complete.

We have no additional provisions or parts of the transcript which we would like to call to the attention of the witness, because I think that that has been adequately done.

Justice Stephens: If you want to call the attention of the witness again to those same portions, you are entitled to do so. The process is necessarily a laborious one, Mr. Steffen, and if you want to take the time to do it, and think it is of advantage to the Government to do so, we will, of course, give you full opportunity.

Mr. Steffen: We are very well satisfied with the witness' testimony along those points. We have no further redirect.

Justice Stephens: Any re-cross?

Mr. Bromley: No re-cross.

Justice Stephens: Does any other defendant have any re-cross?

(No response.)

Justice Stephens: Mr. Sensibar, was there a change of policy in the Cardiff Company after you came into actual control of its policies?

The Witness: Yes, sir, there was.

Justice Stephens: Now, did that change of policy
5471 have to do with price cutting, or did it not?

The Witness: No, sir, it had to do—

Justice Stephens: (Interposing) Just answer me briefly, first. Did it have to do with price cutting, or did it not?

The Witness: I would say not.

Justice Stephens: You would say not?

The Witness: Yes, sir.

Justice Stephens: Did it have to do with methods of distribution? I refer to the distribution directly to contractors rather than through dealers.

The Witness: That is right.

Justice Stephens: Had the company, prior to your coming into control of its policies, but since your acquaintance with it, been a price cutter on plaster?

The Witness: You refer to the period, say, from 1930 to 1935?

Justice Stephens: I think that would be approximately the period, from the time you came into contact with the company as a stockholder until you came into control of it.

The Witness: I think, Your Honor, that the company was, during that period, often led into an erroneous idea of what the real market situation was, and very likely quoted a number of prices that were below the competitive level during that period. I think we made very few mistakes of that character after 1935, because we had the
5472 manpower to investigate and know just what the market level really was.

Justice Stephens: Then you do think that there were some sales, before 1935, below the current price?

The Witness: That is right.

Justice Stephens: And after 1935, you think there were not?

The Witness: That is correct.

Justice Stephens: Then the reason, I assume, you say there was no change in policy, with respect to price cutting, before and after 1935, was that you mean to indicate that in neither period did you intend to sell below the current price, but did so in the earlier period inadvertently?

The Witness: That is precisely correct.

Justice Stephens: Do you know—just answer this question "yes" or "no"—do you know whether or not the company, before 1935, was reputed to be a price cutter on plaster?

The Witness: It was, yes, sir.

Justice Stephens: And what was its reputation, if you know, after 1935, in that respect?

The Witness: I believe its reputation since 1935 has been very good in that respect. It takes a long time to change the opinions of people about a company's reputation, sir.

Justice Stephens: I suppose, since the Court has
5473 conducted a brief examination, it would be only fair to give counsel on both sides an opportunity to question him further, if they desire to.

Mr. Bromley: No questions.

Mr. Steffen: No questions.

Justice Stephens: Then you are excused, Mr. Sensibar. Thank you for attending the Court.

The Witness: Thank you, sir.

(Witness excused.)

Mr. Steffen: Mr. McCormack.

Thereupon HARRY G. MCCORMACK appearing as a witness for and on behalf of the United States, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Steffen:

Q. State your full name, Mr. McCormack, please? A. Harry G. McCormack.

Q. Where are you located? A. In Baltimore.

Q. What company are you with, Mr. McCormack? A. American Cyanamid & Chemical Corporation.

Q. How long have you been with them? A. Since 1928.

5474 Q. 1928? A. Yes, sir.

Q. Were you with the Structural Gypsum Corporation at any time? A. I was with the Structural Gypsum Division, yes, the Structural Gypsum Corporation.

Q. What was the Structural Gypsum Corporation? A. It was a wholly-owned subsidiary of the American Cyanamid Company.

Q. And did they change the status of that company at some point of time? A. Yes, at some time along 1933 or 1934, approximately that time. It then became a division of the American Cyanamid & Chemical Corporation.

Q. It was what was called the Structural Gypsum Division of the American Cyanamid & Chemical Corporation? A. Yes, sir.

Q. What was your office with Structural? A. I was Assistant Sales Manager in charge of Plaster Sales.

Q. That applied to both the Structural Division, and also to the time when the concern was a separate corporation, the Structural Gypsum Corporation? A. That is right.

Q. And you have been in that capacity for how 5475 long, since 1930? A. Since 1928.

Q. Did you have any gypsum experience before you went with the Structural people? A. Oh, yes.

Q. Who were you with? A. I had been with the United States Gypsum Company; the American Cement Plaster Company, which ultimately was absorbed by the Beaver Board Company; and for a short period with the National Gypsum Company.

Q. When you were with the United States Gypsum Company, who was your superior? A. Mr. S. F. Bartlett.

Q. Was there a man named Farley that worked in conjunction with you? A. Yes.

Q. Who was he? A. Jim Farley.

Q. How long ago was that? A. That was back in 1912, just about the time I got out of school. Jim and I were co-partners in crime.

Q. He left the Gypsum Company, did he not, at some

time? A. Jim left it after I did. I preceded him in leaving.

Q. Now, what was the business of the Structural
5476 Gypsum Corporation or the Structural Gypsum Division? A. They manufactured and sold plaster and plaster products, but they did not make board.

Q. What was the source of your supply for plaster? A. We manufactured our plaster from a sludge, a by-product sludge.

Q. That was an American Cyanamid by-product? A. Which came from our parent company's plant.

Q. And in what quantities did that come? A. I can only hazard a guess, but it was sizable quantities, anywhere from 400 up to 700 tons a day.

Q. How was that treated, Mr. McCormack? A. Well, a description of it would be rather technical. I could attempt sketching it.

Q. I want just a general description. A. The sludge came in a slurry form, possibly 35 percent solids and 65 percent water, through a pipeline from our parent company's plant. It emptied into a large decantation reservoir. The solids were drawn from the bottom and put through centrifuges, and the excess water thrown off, and the gypsum sludge was then carried around and finally emptied into kettles and calcined or cooked.

Q. What did you make when you cooked it? A. Calcined gypsum.

5477 Q. And what did you do with that? A. Calcined gypsum is plaster of Paris. That is the base for making wall plaster, gypsum block, or any other gypsum product.

Q. What products did your company make? Did they make board? A. No, sir, they did not.

Q. Did they make tile? A. They made gypsum tile, yes.

Q. And plaster? A. And plaster.

Q. Did you sell any of this calcined gypsum, as such? A. Yes, we did.

Q. Who did you sell it to? A. The Kelley Plasterboard Company.

Q. During what years? A. We sold them on and off over a period of, I would say, beginning along about 1932 or 1933 and continuing possibly up to 1939 or maybe 1940.

Q. Did you buy any board during this period? A. Yes.

Q. And by "board", I mean either gypsum board or gypsum lath. A. Yes, we did.

Q. Which did you buy the most of, board or lath? A. Gypsum lath, mostly.

5478 Q. Why did you buy more lath than board? A. For the reason that our contacts, because of our economic situation in having only plaster to sell, our contacts were mostly with the masons' supply dealers. The masons' supply dealer was usually not considered an outlet for large board, they ordinarily used or sold gypsum lath.

Q. When you say that, you mean you were primarily interested in disposing of your plaster, is that correct? A. That was our principal objective.

Q. Was it important that you also have a source of supply for board, if you were going to sell plaster advantageously? A. It was an advantage to have it.

Q. Why was that so, Mr. McCormack? A. In a good many cases, a dealer would not care to purchase an entire carload of plaster. He might desire to buy it in mixed cars, mixing the plaster with some board. Our competition was in a position to sell in that manner, and we thought it would be an advantage to us to also sell likewise.

Q. That is, I get the impression that your dealer might want to buy both plaster and lath, is that correct? A. Yes.

Q. And he wouldn't want to buy it from two sources? A. That is right.

5479 Q. Now, you stated, I think, that you had been buying board from Kelley during this period, from 1932 until what time? A. Until what time?

Q. Yes. A. We continued to buy it all through the entire period Kelley was in business.

Q. And they went out of business when, do you remember? Was it in about 1938? A. I would judge around that time. Eventually they were bought by the Calvin Tomkins Company.

Q. You mean by the Newark Plaster Company? A. That is right.

Q. And you sold to them for what period of time? A. Newark Plaster Company or Kelley?

Q. You said you sold to Kelley until they went out of business, and did you thereafter sell to the Newark Plaster Company? A. Yes.

Q. And you sold to them until what period of time? A. We are at present selling, to the Newark Plaster Company, some calcined gypsum.

Q. There was a period when their plant burned down, in 1940. You didn't sell at that time, did you? A. Hardly.

5480 Mr. Bromley: What do you mean when you say "you sold"?

Mr. Steffen: Calcined gypsum—is that correct?

The Witness: Yes.

By Mr. Steffen:

Q. And that is sold to the Newark Plaster Company for the purposes of making board? A. I assume that it is.

Q. Is the Structural Division making the same quantity of calcined gypsum now as they were back in 1932 to 1938? A. No, our plant was dismantled possibly 3 to 4 years ago. The quantity of sludge available has been considerably reduced, and almost eliminated, but we did have some gypsum sludge in the impounds back of the plant which we have attempted to salvage, and we retained two kettles in which to cook it. We are selling that as long as it lasts.

Q. Now, when you were buying from the Kelley Plasterboard Company, did you buy at a discount?

Mr. Bromley: What is that?

By Mr. Steffen:

Q. When you were buying board and lath from the Kelley Plasterboard Company, did you buy at a discount? A. They allowed us a discount.

Q. Do you remember what it was, to begin with? A. I think it was 10 percent on the small board, and 12 on the large board, it may have been 12-1/2.

5481 Q. Was that discount later increased? A. Yes, it was.

Q. Do you remember to what amount? A. I think to 12-1/2 and 15 percent, respectively.

Q. And do you remember the year—was that about 1933? A. I could only hazard a guess—possibly at that time.

Q. So far as you recall, it was along about that time, is that right? A. Along about that time, yes.

Q. When you were buying board and lath from Kelley, how was it delivered? A. Kelley delivered some to us at our plant; we picked some up at his plant; or he would ship it on his equipment, or with his equipment, for our account.

Q. And he would ship it directly to the dealers to whom you were selling? A. That is right.

Q. Did you have an arrangement with him whereby you shipped calcined gypsum to him, and took back board or lath in your trucks? A. That is right.

Q. And that board or lath would be delivered where? A. Wherever we could sell it to a dealer.

Q. Would it also, perhaps, be delivered to your
5482 warehouse? A. In some instances, yes.

Q. Where was the Structural Division's plant located? A. At Linden, New Jersey.

Q. Did you have a warehouse there? A. Well, a plant warehouse.

Q. Did you have a warehouse in Philadelphia at any time? A. Yes, sir.

Q. And were shipments made from Kelley directly to that warehouse in Philadelphia, of board and lath? A. That is right.

Q. Now, will you state what areas the Structural Company sold both plaster and lath in—in what areas did they sell? A. Oh, roughly from, I would say, the Connecticut State line, or possibly one or two counties in the extreme western section of Connecticut; through Westchester County, Southern New York State; all of New Jersey; Eastern Pennsylvania; down through this area, into Maryland, the Eastern part of Maryland, coming down into the District of Columbia. That, roughly, was the area. There were some sales made outside of that area, but that, roughly, was where we did business.

Q. Did you receive price lists from Kelley? A. We did.

5483 Q. At which your board was sold?

Mr. Bromley: I object to that as leading, and incompetent because calling for a conclusion.

Justice Stephens: Sustained.

Mr. Steffen: I withdraw that.

By Mr. Steffen:

Q. I now want to show you what has been marked as Government's Exhibit No. 591, which purports to be a price list under date of April 26, 1932, under the heading of Kelley Plasterboard Company—

Justice Jackson: (Interposing) Have we these exhibits?

Mr. Steffen: You should have them. I am sorry I didn't ask you, to begin with, whether you had them.

Justice Stephens: I believe we all have copies now. You may proceed, Mr. Steffen.

How many pages has that exhibit, Mr. Steffen?

Mr. Steffen: It consists of 8 pages, Your Honor.

(The document referred to was marked as Government's Exhibit No. 591 for Identification.)

(Government's Exhibit No. 591 for Identification was handed to the witness.)

Justice Stephens: I count 9 pages.

Mr. Steffen: That probably is correct.

By Mr. Steffen:

5484 Q. I also show you what has been marked for Identification as Government's Exhibit 592, which purports to be a Kelley Plasterboard price list, dated January, 1938.

(The document referred to was marked as Government's Exhibit No. 592 for Identification.)

(Government's Exhibit No. 592 for Identification was handed to the witness.)

Justice Stephens: Is that the one with the picture, Mr. Steffen?

Mr. Steffen: That is right, Your Honor.

I further show—

Justice Stephens: (Interposing) Let's get the record clear as to how many pages that consists of, because it may get torn apart or lost sometime.

It consists of 8 pages.

By Mr. Steffen:

Q. I further show you what has been marked for Identification as Government's Exhibit No. 593, which is dated March 1, 1937, and purports to be a further price list. This exhibit is made up of 3 pages.

(The document referred to was marked as Government's Exhibit No. 593 for Identification.)

(Government's Exhibit No. 593 for Identification
5485 was handed to the witness.)

Justice Stephens: These are all Kelley price lists, are they?

Mr. Steffen: Yes, Your Honor. I was going to ask that question of the witness.

By Mr. Steffen:

Q. Have you had an opportunity, Mr. McCormack, to examine Government's Exhibit 591? A. Yes, I have.

Q. Dated April 26, 1932. A. Yes.

Q. Can you identify that as a price list which you received at Structural? A. They look like Kelley's price lists, all right.

Q. I want you to address your attention first to Government's Exhibit 591, dated April 26, 1932, and I call your attention to the reverse side of the exhibit, upon which there is a stamp. Turn the whole exhibit over. A. Yes.

Q. Can you identify that? A. Yes, it is a mailroom stamp of ours, indicating the receipt of the document.

Q. Now, looking at Government's Exhibit 592, which is the price list of January, 1938, can you identify that as a price list which your company received?

5486 A. I would think it was quite possible that we received it.

Q. And now, in regard to Government's Exhibit 593 for Identification—are you familiar with Exhibit 593? A. I am not familiar with it, but it is possible that we received it.

Q. As I understood your testimony, you did receive price lists from Kelley? A. That is right.

Justice Stephens: Were these taken out of the files of Kelley?

Mr. Steffen: Out of Structural's files.

Justice Stephens: I meant Structural's files.

Mr. Steffen: That is right.

I offer in evidence at this time Government's Exhibits 591, 592 and 593, as price lists of the Kelley Plasterboard Company.

Mr. Bromley: We make only the usual objection.

Justice Stephens: Received, subject to the usual reservation with respect to declaration of alleged co-conspirators.

(The documents referred to, marked as Government's Exhibits Nos. 591, 592 and 593, were received in evidence.)

5487 Justice Stephens: Who is representing Newark here today?

Mr. O'Donnell: I do, Your Honor.

Justice Stephens: That is right. Thank you.

By Mr. Steffen:

Q. Could you say, Mr. McCormack, whether you were furnished with price lists by Kelley throughout this period from 1932 to 1940, at which your board was sold?

Mr Bromley: I object to that as leading, and also incompetent because calling for a conclusion.

Justice Stephens: Read the question.

(The question was read by the reporter.)

Mr. Steffen: I would like to withdraw the question, Your Honor, because I didn't intend to ask the latter part of it.

Justice Stephens: Very well.

By Mr. Steffen:

Q. Did you receive price lists from Kelley from time to time all through this period from 1932 to 1940? A. I would say yes. The last couple of years, I am not so sure that Kelley continued to publish a price list, but I would say we received them as long as he published them.

Q. Did you ever buy board from the United States
5488 Gypsum Company? A. Yes, we did.

Q. During what period? A. I would think possibly in 1937 and 1938.

Q. Who did you contact in the United States Gypsum Company when you purchased the board? A. Mr. Gallagher.

Q. Who? A. Mr. Gallagher.

Q. Did you make the arrangements? A. I did.

Q. And how long did you say, for the years 1937 and 1938? A. Roughly, yes, for parts of each of those years.

Q. What transpired at the end of that time, did you discontinue purchasing at that time? A. USG discontinued selling us.

Q. And did you have any conversation with Mr. Gallagher about that? A. Yes. Gallagher told me that their own business had increased to such an extent that their production was not sufficient to fill their own orders and ours too.

Q. Were you able to buy or did you attempt to buy board from them as a dealer at that time? A. As a distributor.

Q. I mean to say, your arrangement with USG was
5489 to buy at a discount? A. Oh, yes, yes.

Q. And your conversation with Mr. Gallagher had altogether to do with buying board from USG at a discount? A. Well, I believe it was generally accepted that we knew what the discounts were.

Q. Surely. But what I am getting at is that you didn't attempt to buy any on a dealer basis from USG, did you? A. Oh, no.

Q. Did you form another connection about this time, that is, take another source of supply for board and lath? A. We already had other connections.

Q. Who else were you buying from? A. We were buying from Kelley, or the old Newark company. After Kelley faded from the picture, we bought from USG, Ebsary—

Q. (Interposing) There was a time when you bought from Ebsary? A. Yes.

Q. Do you remember about when that started? A. Again, I can only hazard a guess. Possibly in 1937.

Q. About the time that you discontinued buying
5490 from USG? A. Possibly so.

Mr. Bromley: Wait a minute, the witness said he bought from USG in 1937 and 1938.

Mr. Steffen: That is correct.

The Witness: We were buying from two or three sources at one time.

By Mr. Steffen:

Q. That is, there was a period, as I get your testimony, in 1937 and 1938, when you were buying from Kelley or Newark, and from USG, and also from Ebsary; is that right? A. That is right.

Q. How long did that continue, that triple buying? A. Well, that continued for quite a lengthy period, I would say possibly a year, until USG advised us they could no longer furnish us board. We then only had Kelley and Ebsary.

Q. Was there a time, Mr. McCormack, when a question came up between Structural and Kelley concerning commission men, do you remember that? A. Yes, I think I do.

Q. And that was about what time, Mr. McCormack? A. Oh, I would place it probably in 1936 or 1937.

Q. Did you have any discussion with Mr. Kelley at about that time? A. I had quite frequent discussions with
5491 Kelley, I mean throughout the years, throughout our business relationship.

Q. Did you discuss, with Mr. Kelley, prices, throughout your relationship, prices at which he would sell you board? A. Yes. That is quite possible.

Q. Do you have any recollection as to the prices at which you should sell board? A. Kelley furnished us his price lists, and—

Q. (Interposing) And you understood— A. (Interposing and continuing) —and we went along with those prices.

Q. I see.

Now, about commission men. Did Mr. Kelley ever say to you anything concerning his right to have commission

men under the license agreement? A. I think Kelley told me at one time that he was not in a position to sell through commission men.

Q. I see. Did he tell you whether that restriction applied to Structural, perhaps? A. No. He may have thought I accepted it by inference, but he never made any actual demands upon me.

Q. Did your company have a man by the name of Stremble in your employ? A. Yes, sir, they did.

5492 Q. Was he working on a commission basis? A. He was a commission salesman.

Q. And did you ever have any conversation with Mr. Kelley about Mr. Stremble? A. Yes, I did.

Q. Can you relate that conversation? A. Kelley phoned me—I can't place the date definitely—that Stremble had been cutting his commissions, and had been rebating part of his commissions to some dealers to whom he was selling board, and he wanted to know what I was going to do about it.

I told Kelley I would investigate the matter, because that was wholly contrary to our policy.

Q. Did you make an investigation? A. I did.

Q. Did you report back to Mr. Kelley, do you remember? A. I can't recall that I did.

Q. What, if anything, did you do in regard to Mr. Stremble? A. I eventually fired him.

Q. You say "virtually fired him"? A. I said "eventually fired him".

Q. At about this time that Mr. Kelley was talking to you about him? A. That would be rather difficult to place

5493 the timing of it. I would say somewhere in there.

Q. Did Mr. Kelley mention the license agreement in his conversation with you, and any restrictions that he might be under as respects commission men? A. He mentioned the restrictions he was under. Whether it was at that particular time, I couldn't say definitely.

Q. Did he say whether or not he had any commission men in his employ? A. He never indicated it to me.

Q. In your testimony at the criminal trial, at page 1970, you testified that he said that commission men were taboo; is that correct? A. Yes.

Mr. Bromley: I object to this as leading, and move to strike the answer.

Justice Stephens: It may go out. You shouldn't lead the witness, Mr. Steffen. The witness is an intelligent witness, and can answer the questions without any leading.

By Mr. Steffen:

Q. Could you give us in any more detail what Mr. Kelley may have told you regarding commission men? A. Somewhere, sometime, in the course of a conversation I had with him, he indicated that under the license agreement he could not sell board through a commission sales-
5494 man.

Q. And did you understand that to place any obligation upon you?

Mr. Bromley: I object to that as leading.

Justice Stephens: The objection is sustained. Ask the witness what effect, if any, it had upon him.

By Mr. Steffen:

Q. What effect, if any, did that have on you? A. We continued to sell through commission salesmen.

Q. How many salesmen did you have? A. Oh, it varied from time to time; probably from 10 to 15 or 16.

Q. And what effect did it have, if any, in connection with Mr. Stremble? I think you testified that he was eventually fired? A. That is right.

Q. And was that partly because—

Mr. Bromley: (Interposing) Just a moment. I move to strike out, "I think you testified that he was eventually fired"—or at least the witness should be given the opportunity to answer the question—"what effect, if any, did it have upon Stremble?"

Justice Stephens: That objection is well taken.

By Mr. Steffen:

Q. What effect, if any, did it have upon Mr.
5495 Stremble, Mr. McCormack? A. Well, frankly, it tended to weaken my confidence in Stremble.

Mr. Bromley: I don't believe that that is a responsive answer, if the Court pleases.

Mr. Steffen: I don't think so, either, Your Honor.

By Mr. Steffen:

Q. The question was: After your conversation with Mr. Kelley, in which he told you that he was under restrictions, under the license agreement, not to have commission men—the question then is: What, if any, effect did your conversation with Mr. Kelley have upon your relations with Mr. Stremble? A. I can't say that it had any effect.

Q. I think you testified you made an investigation, is that right? A. That is right.

Q. And you eventually discharged Mr. Stremble? A. That is right.

Mr. Steffen: I would now like to have marked as Government's Exhibits for Identification the following documents:

A letter of June 5, 1936, signed H. F. Sadler, addressed to the Board Survey Company, to be marked as Exhibit 594; a letter dated June 8, 1936, with the initials
5496 "CBM" in the lower left-hand corner, addressed to Kelley Plasterboard Company, as Government's Exhibit 595; and a letter of July 16, 1936, with the same initials in the lower left-hand corner, addressed to the United States Gypsum Company, as Government's Exhibit 596 for Identification. Attached to Exhibit 596 is a green copy of a letter on the Board Survey Company form, dated June 22, 1936, signed in typewriting by Mr. S. J. Kelley for the Kelley Plasterboard Company.

Justice Stephens: You had better mark that 596-A.

Mr. Steffen: Yes, Your Honor.

(The documents referred to were marked as Government's Exhibits Nos. 594, 595, 596, and 596-A, respectively, for identification.)

(Government's Exhibits Nos. 594, 595, 596 and 596-A for Identification were handed to the witness.)

Mr. Steffen: I might say that at the criminal trial, Your Honor, these exhibits were admitted upon stipulation, as being genuine, and were received in evidence at that time.

I now ask Mr. Bromley whether they may similarly be admitted here?

Mr. Bromley: I would like to look at them.

Justice Stephens: Who does the letter of July 16th purport to be from?

Mr. Steffen: From Mr. Mahan, I believe, who is a
5497 lawyer in Mr. MacLeish's office.

Justice Stephens: It is addressed to the United States Gypsum Company.

Mr. Steffen: And that also applies to the letter of June 8, 1936. He is a lawyer in the MacLeish firm.

Mr. Bromley: I agree that these documents are authentic, and were sent and received.

Justice Stephens: Thank you. That will save a great deal of time.

Mr. Steffen: We offer in evidence Government's Exhibits 594, 595, 596 and 596-A.

Mr. Bromley: We make only the usual objection.

Justice Stephens: Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents referred to, marked as Government's Exhibits Nos. 594, 595, 596, and 596-A, respectively, were received in evidence.)

By Mr. Steffen:

Q. I am going to ask you to look, if you will, Mr. McCormack, at Government's Exhibit 596-A, which purports to be a report from the Kelley Plasterboard Company of an investigation of the Stremble situation, and ask if that is accurate, in so far as it concerns you?

5498 A. Not wholly accurate.

Q. What is your understanding of that?

Mr. Bromley: I object to what his understanding is. If he wants to bring out the conversation, I think he should be asked about it.

Justice Stephens: You may tell what explanation you made to Mr. Kelley. The Court will then have to determine whether or not Mr. Kelley's statement was correct. If you have anything to add to what you have already said, Mr. McCormack, you may tell what statement you made to Mr. Kelley on the subjects involved in this purported explanation.

The Witness: I am quite confident that on general principles, I denied to Kelley that Stremble had been cutting his commissions.

By Mr. Steffen:

Q. Do you recall whether you made any assurances to Kelley of the sort mentioned in this report?

Mr. Bromley: I object to that as leading, and incompetent because calling for a conclusion rather than the conversation.

Justice Stephens: That objection is sustained.

By Mr. Steffen:

Q. Do you recall any assurances being given to Kelley concerning the possibility that Mr. Stremble would no longer split commissions?

5499 Mr. Bromley: The same objection.

Justice Stephens: The Court will sustain the

objection. The Court must ask Government counsel not to continue to invade the rulings of the Court with respect to leading questions.

By Mr. Steffen:

Q. I think you testified earlier that you didn't recall for sure whether you had made any report back to Mr. Kelley, is that correct? A. I think that is right.

Q. And does a reading of Government's Exhibit 596-A perhaps refresh your recollection? A. It would not necessarily follow that I had taken it up with Kelley again.

Q. Well, could you say for sure, Mr. McCormack, whether you did or not? A. I don't believe I did.

Q. You don't believe that you did report back? A. I don't believe I did.

Q. Now, I think you testified that beginning in 1937 or thereabouts, you commenced buying board and lath from the Ebsary Gypsum Company; is that right? A. That is right.

Q. And did the matter of Mr. Stremble ever come up in connection with your sale of Ebsary board?
5500 A. Yes, sir, it did.

Q. And do you recall about when? A. It is a little difficult to place, at this time. It was perhaps in 1938.

Q. And did you have a conversation with anyone from Ebsary about Mr. Stremble? A. Mr. Lenci.

Q. What did Mr. Lenci say, or will you relate the whole conversation, if you can? A. Well, he called and said that he had a report that Stremble was cutting commissions. From my conversation with Lenci, I assumed that Stremble had gone in and stepped on the toes of one of his dealers with a cut commission price.

Q. What was Mr. Lenci's attitude in the matter? A. Well, naturally, not a very happy one—

Mr. Bromley: (Interposing) I object to that as immaterial, and incompetent because calling for a conclusion.

Justice Stephens: The objection is sustained.

State what Mr. Lenci said to you, and what you replied. You, of course, understand that the Court doesn't expect you to remember the detailed words that were used, it is so long a time ago, but state the substance and effect of what he said and what you said.

The Witness: Lenci stated that he understood
5501 Stremble was running wild among a group of dealers in either Kings or Queens County, cutting his com-

missions; and again, I told Lenci I doubted it. That was done on general principles, wholly, in defense of one of my salesmen. I promised, however, that I would check into the matter.

By Mr. Steffen:

Q. Did Mr. Lenci indicate at all that he was operating under any restrictions, under the license? A. I think he did. Whether at that time or some other, I couldn't say for sure.

Q. What did he say in that connection, if you can remember? A. That his company was not permitted to sell through commission men.

Q. And what did you understand that meant, as respects your company?

Mr. Bromley: I object to that as incompetent because calling for a conclusion, and as leading.

Mr. Steffen: I think that is a proper question, Your Honor, on the ground that we are wishing to establish that perhaps Mr. Lenci's conversation had some influence on Mr. McCormack's action.

Justice Stephens: Well, the proper way to get that information is to ask this witness what, if any, influence or effect this had upon him. That is the view of the
5502 Court. The objection is sustained.

By Mr. Steffen:

Q. Well, Mr. McCormack, will you answer that question—what, if any, influence did Mr. Lenci's statement have upon your action? A. It certainly influenced me to check into the matter, and make an investigation, because if Stremble had been pursuing such a course, it was wholly contrary to our policy.

Q. Do you recall whether you reported back the results of any investigation you made, to Mr. Lenci? A. I can't recall. I don't know.

Q. I want now to show you what has been marked for Identification as Government's Exhibit 597, which is a letter dated June 20, 1938, purported to be signed by Mr. McCormack, addressed to Mr. Stremble.

(The document referred to was marked as Government's Exhibit No. 597 for Identification.)

(Government's Exhibit No. 597 for Identification was handed to the witness.)

The Witness: That is my letter.

By Mr. Steffen:

Q. You say that that is your letter? A. Yes.

5503 Mr. Steffen: I now offer in evidence Government's Exhibit No. 597.

Mr. Bromley: We object on the ground that it is immaterial and incompetent because not binding on any of the defendants, since it is admittedly not a declaration of a co-conspirator.

Mr. Steffen: We offer it not as a declaration of a co-conspirator, obviously, but simply as having a bearing upon the actual state of mind of Mr. McCormack and the Structural Gypsum Company as of this time, and as giving an indication of the probable basis upon which they acted in dealing with Mr. Stremble following Mr. Lenci's telephone conversation.

Justice Stephens: In other words, you are offering it in the same manner that you offered the statements of Mr. McCormack to Mr. Lenci?

Mr. Steffen: No, your Honor, those would come in as admissions on the part of Mr. Lenci.

Justice Stephens: What has the state of mind of this witness, and his relationship with Stremble, got to do with the issues in this case?

Mr. Steffen: The charge in the case, your Honor, applying here, is that the gypsum manufacturers have influenced, in one way or another, the prices and the terms and conditions upon which manufacturing distributors have resold board, and we have testimony now to the

5504 effect that Mr. Lenci had talked with Mr. McCormack in regard to Stremble, and this letter indicates the understanding which Mr. McCormack apparently had of that matter on June 20, 1938. Now that understanding is important, as the state of mind or understanding of the manufacturing distributor in question on the date or at the time when Mr. Lenci raised this point. It is an indication that one of the reasons why Mr. McCormack acted in firing Mr. Stremble was that he felt that there was some obligation under the license agreement, or under Mr. Lenci's statement concerning the license agreement, that he should not engage commission salesmen, particularly where they split commissions.

Justice Stephens: Is this one of the companies which is described in the bill of particulars as a manufacturing distributor whose resale prices were fixed?

Mr. Steffen: Yes, your Honor.

Justice Stephens: And do you contend that splitting commissions was a method of resale price fixing?

Mr. Steffen: Well, it is Mr. Bromley's argument, certainly, that if commissions are split, it does effect a decrease in the price to the dealer, and that therefore it constitutes, in effect, a rebate, and they would thereby have failed to maintain prices. The connection, I think, is fairly close.

Mr. Johnston: If the Court please, on behalf of Texas, as to this, I just can't see where there is any pos-
5505 sible relevancy or materiality or where we would be bound in any way by a letter between two parties who are entire strangers to this law suit.

Justice Stephens: Well, as I understand it, it is offered as a circumstance showing the state of mind of the Structural Gypsum Division in respect to the resale prices of Structural as a manufacturing distributor, it being asserted that that state of mind is produced by the influence of Ebsary.

Of course if this witness were not here, Mr. Johnston, unless this were admissible merely as a circumstance, regardless of its truth, it would come within the hearsay rule; but the witness is here, subject to cross examination, and under oath, and you are not harmed, therefore, by the absence of cross examination.

The question would seem to be more as to its relevance. Let me hear you, Mr. Bromley, again, as to why you think it is not relevant under the charge of resale price fixing?

Mr. Bromley: First, I take it that Mr. Steffen admits it is not relevant on the ground that it is a declaration of a co-conspirator. That brings us to the theory that it is relevant—as I understand him—on the state of mind of this witness. Now I suppose that is under the verbal act rule of evidence, if it is under anything.

But I am not sure what his state of mind has to do with
it. Again counsel for the Government seeks to come
5506 in the back door. Why doesn't he ask him whether he had an understanding or agreement with Ebsary about resale prices or practices? I don't believe that this sort of charge can be proved in this sort of way by trying to show the state of mind that Mr. McCormack had with one of his salesmen.

Justice Stephens: Why wouldn't state of mind be one of the circumstances tending to show the effectiveness of the asserted agreement, or showing, perhaps, its existence? If he acts verbally in a manner which he would act in if he had an agreement, why isn't that, while perhaps not entitled to great weight, a circumstance tending to prove an agreement with respect to resale price fixing?

Mr. Bromley: I think it probably is, and I think the Court has admitted other evidence of that type on that theory. I can't distinguish it.

Justice Stephens: It may be received in evidence; and the objection is overruled.

(Government's Exhibit No. 597 was received in evidence)

Mr. Bromley: May it be understood that this is received subject to the usual reservation?

Justice Stephens: It is not being received as the declaration of a co-conspirator.

Mr. Bromley: That query of mine raises this question in my mind. I suppose I should have asked the
5507 Court to rule with respect to all the testimony given so far by this witness, with relation to his dealings with Kelley and Ebsary, that it all should be received subject to the usual reservation.

Justice Stephens: So far as this witness has testified concerning conversations with Lenci or Kelley, it should be received subject to the usual reservation with respect to declarations of alleged co-conspirators.

Mr. Bromley: May that be understood as to future testimony, or rather as to the future so far as other conversations of a like nature are concerned?

Justice Stephens: The record may so show.

We have reached an appropriate point, I think, for the afternoon recess.

Announce the recess.

(Whereupon, a five minute recess was taken, after which the trial was resumed as follows:)

5508 Justice Stephens: Proceed.

By Mr. Steffen:

Q. I now show you what has been marked, Mr. McCormack, as Government's Exhibit 598, which purports to be a price list, dated September 14, 1936.

(The document referred to was marked as Government's Exhibit No. 598 for identification.)

(Government's Exhibit No. 598 for identification was handed to the witness.)

Justice Stephens: That skips the letter of March 7, does it?

Mr. Steffen: Yes, your Honor.

Justice Stephens: That is a two-page letter, the present exhibit?

Mr. Steffen: No, just one page, your Honor, dated September 14, 1936.

Justice Stephens: Oh, yes.

By Mr. Steffen:

Q. Did you make up price lists, Mr. McCormack, for your salesmen? A. At various times, yes.

Q. And from what information did you make up your price lists for board and lath? A. I would be guided
5509 by the price lists furnished to me by my suppliers.

Q. And can you identify Government's Exhibit No. 598? A. It looks like our price list.

Q. Could you say how that was made up? A. I would assume it was made on the basis of prices furnished by one of our suppliers, Kelley, or Ebsary, or whoever we were buying from.

Q. Who was supplying you as of this time, do you remember—1936? A. Kelley, I would think.

Q. Then can you say whether or not it was made up from Kelley's price lists? A. It is quite possible, yes.

Q. Would you say that that is your best recollection? A. That would be my best recollection.

Mr. Steffen: I offer Government's Exhibit 598, your Honor.

Mr. Bromley: We make the usual objection, and also we make the additional objection that it is immaterial and incompetent because not binding on the defendants.

Justice Stephens: I am a little puzzled as to why you make the usual objection. This isn't being offered as a declaration of a co-conspirator, is it?

Mr. Steffen: No, your Honor.

Justice Stephens: It is offered only to show ac-
5510 tion, or alleged action, following upon the asserted direction of Kelley, is it not?

Mr. Steffen: That is right, your Honor, and it should be admissible, I think, upon the same grounds as Exhibit 597 was admissible.

Justice Stephens: Well, of course it may be connected with Kelley. To the extent that if connected by other evidence it may be in the nature of a declaration of Kelley, it is received subject to the usual reservation with respect to declarations of alleged co-conspirators; and the objections as to its materiality and relevancy are overruled.

(The document referred to, marked as Government's Exhibit No. 598, was received in evidence.)

By Mr. Steffen:

Q. And now, Mr. McCormack, I want to direct your attention to the fact that you were buying, according to your testimony, in 1937 and 1938, you were buying board from three companies, Ebsary, USG and Kelley—is that correct? A. That is correct.

Q. And did you sell in the same territories that they did? A. Yes. Our territory embraced areas in which they also sold.

Q. And did you understand that they were all
5511 three, or rather Kelley and Ebsary, under a license agreement?

Mr. Bromley: I object to his understanding as immaterial and incompetent.

Justice Stephens: Sustained.

Mr. Steffen: I will withdraw the question.

By Mr. Steffen:

Q. What, if any, obligation, Mr. McCormack, did you feel that you were under to sell board procured from Kelley at this time, at Kelley's prices? A. I wouldn't say it was an obligation; it was good business sense to go along with those prices.

Q. Why? A. If we undersold our source of supply, and continuously did it, I don't believe we would have a source of supply very long.

Q. And what was your practice, did you undersell your source of supply?

Mr. Bromley: I object to that on the ground that the prices that he charged are the best evidence.

Mr. Steffen: I asked, if I might say, for his practice, not for the actual proof of any particular transaction, and I think he may answer as respects his practice. I have some invoices, which I will also show.

Mr. Bromley: I think he may be permitted to answer with respect to his policy, which he already has answered.

5512 Justice Stephens: I think that is proper, and I thought he had answered that. As to what he did sell at, that must be answered by the actual prices, if they are available, or his memory of them, if they are not, and I assume that you have the price lists available.

If there is any doubt in the record as to what their practice was with respect to underselling, you may repeat that question. I thought the record showed that Mr. McCormack testified in effect that they didn't have the practice of underselling their suppliers. But you may ask that question.

Mr. Bromley: Does your Honor mean "practice", or "policy"?

Justice Stephens: Policy. I was using the words interchangeably.

Mr. Steffen: I think that the policy is sufficiently established, and I have no wish to go into a large volume of invoices to disclose what actual prices were obtained.

Justice Stephens: And we don't wish to have them in the record if it is escapable. At the same time I think that if defendants feel, in order to protect their rights, that they must have an actual evidential showing under the rules as to what the prices were, so that the Court can tell whether there was a following of the Kelley prices or not, that that objection urging the best evidence rule is well taken.

Mr. Bromley: Counsel for the Government well knows that it developed at the criminal trial that these in-
5513 voices will show that the prices were not the same, and that there was a very great dispute about it. It turned out that the prices varied very greatly on account of credit memoranda.

Justice Stephens: Then we will have to go into that.

Mr. Steffen: I don't think I need anything further at this point, your Honor. We have no further questions.

Justice Stephens: You are not offering the April 18th letter?

Mr. Steffen: No, your Honor.

Justice Stephens: You may cross-examine.

Cross-Examination

By Mr. Bromley:

Q. Mr. McCormack, the Structural Company had no license agreement with USG, did it? A. No sir, we did not.

Q. You knew that at all times during the period that you were connected with the company, didn't you? A. I did.

Q. And you knew that your company was not bound by any minimum prices on patented gypsum board, fixed by USG? A. We never accepted that we were.

Q. Well, you knew as a matter of contract that you had no contract with USG whatsoever, isn't that right? A. We had no contractual obligations.

Q. Now isn't it likewise the fact that you had no
5514 understanding or arrangement or agreement with Kelley as to what your resale prices would be? A. I couldn't honestly testify that we had any arrangement with any of our suppliers.

Q. You mean by that that you had no arrangement with Ebsary or with USG or with Kelley with respect to your resale prices, don't you? A. No sir.

Q. You had none, is that right? A. We had none.

Q. You have told the Court that your policy, as I understood you, was to resell the board at as near your suppliers' prices as you were able to, is that right? A. That was our policy.

Q. Now will you tell the Court the reason for that policy? A. I have already explained that it was just business prudence. We couldn't undersell our sources of supply, and expect them to continue furnishing us board with which to undersell them. That is just common horse-sense.

Q. And as you said, your main business was the manufacture and sale of plaster, wasn't it? A. That is right.

Q. And the only reason you sold this board at all was to implement or aid your plaster sales, is that cor-
5515 rect? A. I have already testified to that.

Q. Now did you arrive at that policy, of which you have just spoken, independently of any arrangement with anybody else and because you thought it was the best thing to do for your company? A. It was a company policy, it was evolved within the company, as a company policy.

Q. You realized, did you not, that when Kelley, Ebsary or USG sold you board at a discount, that that was more or less of an accommodation or favor to you? A. I would think it would be a sales incentive.

Q. A sales incentive? A. I would think so.

Q. Well, it was an accommodation to you? A. It was an accommodation, yes. We needed the board to round out our sales to the dealers.

Q. And isn't it the fact that at no time was the discount which you received sufficiently great to enable your company to make any substantial profit out of the board business? A. Well, I don't believe we ever made any great

profit. I don't know that there was ever any cost study made to determine that definitely.

Q. But isn't it the fact that you weren't in the business of buying and reselling board because of the profit
5516 involved in it? A. No, I wouldn't say that.

Q. What do you mean by that, that you did make some money? A. We evidently made a small profit. As I indicated, how much I don't know. It wasn't much. With what the discounts were, it wasn't enough to get rich on.

Q. And as a matter of fact the margin of gross profit which the discount allowed you was pretty generally used up in selling expense and handling and warehousing, wasn't it? A. A good part of it would have to be charged off that way.

Q. Now you were in direct competition at all times, so far as the sale of board was concerned, with each one of the suppliers from whom you bought board, weren't you? A. That is right.

Q. You solicited their trade, their customer trade, and they solicited yours? A. It was open competition, we were all entitled to sell or approach any dealer we had a mind to.

Q. And what would you say about the nature of the competition, was it vigorous, or wasn't it? A. I would say it was most vigorous.

Q. And that goes for the entire period that you were connected with the company, wouldn't you say? A.
5517 Most assuredly.

Q. Now you knew generally, did you not, that all of your suppliers were licensees of USG, so far as patented board was concerned? A. I think that was general information within the industry.

Q. And you knew, of course, that USG was the licensor, didn't you? A. I did.

Q. Wasn't one of the reasons for trying to get as much as you could for your board, the fact that your margin of profit was small? A. That may have been a contributing reason.

Q. Well, you wanted to get as much for your board as you could get, didn't you? A. Yes, naturally.

Q. You couldn't have sold it at any higher price than was being charged by USG or Ebsary or Kelley, could you? A. No, we couldn't get a premium for it, no, certainly not for the same brand of board.

Q. By the way, was this board which you purchased and resold, marked with your trademark or the trademark of

your supplier? A. It was always sold on the supplier's trade mark.

Q. That is true for USG and Ebsary and Kelley—
5518 it was their board? A. That is true.

Q. So that as to board that you sold, which was found in the dealer's hands, anybody who was interested in it wouldn't be able to tell whether that board was sold to the dealer by you or by USG, so far as Sheetrock and Rocklath were concerned, is that right? A. I would say that that is correct.

Q. And that same answer is true so far as the Ebsary board is concerned? A. That is right.

Q. And likewise that would be true of the Kelley board? A. That is right.

Q. In other words, once that board came into the possession of the dealer, nobody else could tell whether the dealer had bought the board from you or from Kelley, for instance? A. That is right.

Q. Wasn't one of the reasons that your policy was to sell as nearly as you could at the same prices as your suppliers charged, because there was so little money in the business anyway that you wanted to get as much as you could? A. Naturally we sought to make a profit.

Q. And was that the reason why, as a matter of policy, you determined to charge the same prices, if you could get them, as your suppliers were charging for this pat-
5519 ented board? A. Naturally.

Q. And is that another reason why you did not, consistently, as a matter of policy, attempt to undersell your supplier? A. I would say that was one of our definite reasons.

Q. And is it true that quite apart from any license agreement, you would at that time have regarded it as bad business for any distributor to cut the prices of that distributor's supplier? A. I would only want to answer for myself. I wouldn't attempt to cover the other fellows.

Q. I didn't mean to ask you about the other fellows. I just was talking about you. Wouldn't you say generally, without regard to any license agreement, that it would have been poor policy for you to cut the prices at which your supplier of any goods was selling those goods on the open market? A. Without question.

Q. Now it is the fact that you knew at all times that you were not bound to charge any particular price for board, or to follow any particular terms of sale on board—

that is the fact, isn't it? A. We never felt that we were under any definite obligation, no.

Q. And what is the fact about jobbers, for instance—didn't Structural at all times sell to jobbers at a dis-
5520 count throughout this period? A. Whether during the entire period or not, it would be difficult to say. For a good part of the period, yes.

Q. And isn't it the fact likewise that throughout this entire period the Structural Company had many salesmen who were compensated on commission? A. Yes, there were.

Q. You never changed that practice or got rid of those salesmen, did you? A. No.

Q. Again, isn't it likewise the fact that throughout this entire period of time, for instance, Structural permitted dealers to pick up small quantities of board at the Structural Company's mill? A. Yes, they did.

Q. And those quantities that you permitted thus to be picked up were smaller quantities than Kelley was permitted to have picked up under the terms of his license, or at least as a matter of his practice, isn't that right? A. That may possibly be so.

Q. Well, you would sell a dealer any quantity, to be picked up at your mill, wouldn't you? A. If he came to our mill to get a truckload of plaster, and wanted a thousand or two thousand or three thousand feet of board, we felt we ought to give it to him, as a matter of ac-
5521 commodation.

Q. And you did give it to him? A. We did, yes.

Q. And that was throughout the period? A. I would think so.

Q. Now, were you ever threatened by anyone at any time that USG's consent to Ebsary or Kelley to sell you would be withdrawn? A. I can't recall any such threat, no.

Q. Were you ever told that any conditions had been attached by USG to any consent which it had granted Ebsary or Kelley to sell you at a discount? A. Frankly, I didn't know until quite late in this picture that we ever were selling under a consent.

Q. Did you ever have anything to do with the Board Survey Company? A. No sir.

Q. Did you ever, before today—or perhaps I should say before the criminal trial—see either Exhibit 594, Exhibit 595, Exhibit 596, or Exhibit 596-A?

Justice Stephens: Let the witness see those exhibits, unless they are before him, so that he will be sure what he is answering.

(Government's Exhibits Nos. 594, 595, 596, and 596-A were handed to the witness.)

5522 The Witness: What were the numbers of those?

Mr. Bromley: 594, 595, 596, and 596-A.

The Witness: I don't know that I ever saw them at the criminal trial.

By Mr. Bromley:

Q. Then is it the fact that today is the first time you have ever seen those documents? A. I would say yes.

Q. Did you ever at any time receive any communication in writing from the Board Survey Company? A. No sir, I did not.

Q. Did you ever at any time receive any communication or complaint about what you were doing in the market, or selling in the market, from anybody representing the Board Survey Company? A. No sir, I did not.

Q. Did any representative of the Board Survey Company or USG ever call upon you and complain about your resale prices or your resale practices? A. No sir.

Q. Now, Stremble was a commission salesman in the employ of Structural, wasn't he? A That is right.

Q. And he was discharged, not once by you, but
5523 twice, wasn't he? A. That is correct, yes.

Q. And isn't it a fact that he was discharged, not because he was a commission salesman, but because you felt that you could not control his practice of rebating a part of his commission to your customers? A. Well, we had satisfied ourselves pretty well on that point. In fact, when we rehired Stremble the second time, he was really on probation, and when we found he was again cutting commissions, we fired him again.

Q. Now, was Stremble fired because of anything that was brought to your attention by any of your other salesmen in your organization? A. Yes, we had—

Q. (Interposing) What was that? A. Stremble was selling in an area where we had a regular, established salesman, a salaried salesman who had been with us for a number of years.

Q. A salaried salesman? A. That is right.

Q. Not on commission at all? A. That is right.

Q. What was his name? A. Horne.

Q. Did he complain to you about Stremble's activities? A. Yes, he complained several times.

5524 Q. What did he say? A. The same thing as Kelley and Lenci had said, that he had been cutting commissions.

Q. What was the reason that he was complaining? A. Stremble was stepping on his toes. He had inadvertently gone into a couple of Horne's dealers and made an offer to them. Horne, naturally, felt that he was being placed at a disadvantage, and he came to me to complain.

Q. Well now, when you say that Stremble went into a couple of Horne's dealers, you mean a couple of dealers that were customers of the Structural Gypsum Company, but who were regularly sold by Structural through its salesman Horne, don't you? A. That is right.

Q. Now it is a fact, isn't it, that Horne was not in a position to split commissions, because he didn't receive commissions? A. He didn't receive commissions.

Q. Therefore, he was not in a position to split commissions, was he? A. He couldn't.

Q. He got the same amount of salary no matter how much business he produced? A. That is right, he was a salaried salesman.

5525 Q. Now Stremble went, on one or more occasions, to one of these customer friends of Horne and got the order from that particular dealer, isn't that right? A. I don't know whether he ever got the order, but Horne claimed he made the offer.

Q. He made the offer? A. Yes.

Q. And if he had gotten the order, that is if Stremble had gotten the order, Stremble would have been paid a commission on that order, wouldn't he? A. Oh yes.

Q. And he would have gotten the credit for getting that business, rather than Horne? A. We couldn't do otherwise.

Q. Isn't that what Horne was complaining about? A. Well, we ourselves wouldn't care to sell through a commission man where we were already getting the business from a salaried salesman. That would be sort of cutting our own throat.

Q. Wasn't that the reason that you first fired Stremble and then put him on probation when you took him back? A. It may have been a contributing factor.

Q. And wasn't that the reason that you finally fired him the second time? A. It was one of the contributing factors, yes.

Q. You testified that prior to the time that
5526 Stremble was fired the first time, you had a talk with Mr. Kelley, didn't you? A. Yes, I did.

Q. Now in that conversation, Kelley didn't make any mention either of USG or Board Survey, did he? A. No, he did not.

Q. Nor did Mr. Kelley mention anything about any license agreement, did he? A. No sir, he did not.

Q. Stremble's activities in splitting commissions and getting business thereby, might have resulted in taking business away from the Kelley Company, might it not? A. It was quite possible, yes.

Q. And isn't it the fact that all Mr. Kelley did was tell you that he had heard that one of your men was splitting commissions, and asked you to investigate the matter? A. Kelley indicated to me that Stremble had gone to a couple of his customers—

Q. (Interposing) A couple of Kelley's customers? A. A couple of Kelley's customers—and it is my recollection that it was on that basis that he telephoned me, that Stremble was hurting Kelley.

Q. And isn't it the fact that all you did was call Stremble in and ask him what he was doing? A. Yes.

5527 Q. Now you did not take Stremble off selling board, did you? A. No, I eventually took him off selling everything.

Q. At that time, I mean, when you called him in after Mr. Kelley had talked to you, you didn't restrict his sales—A. (Interposing) Not immediately, no.

Q. And you made no report back to Mr. Kelley whatsoever, did you? A. Not that I recall.

Q. Isn't it the fact that you let the matter drop after your talk with Kelley because Stremble had told you that he was not rebating? A. There would be no advantage to me in resurrecting it and keeping it hot.

Q. So you let it drop, didn't you? A. I think that that is what developed.

Q. Wasn't it some time later, after your salesman Horne had complained about Stremble splitting commissions, that you called Stremble in again and decided to fire him? A. May I have that question repeated?

Mr. Bromley: Will you read it, Mr. Reporter?

(The reporter read the question as above recorded.)

The Witness: I wouldn't know definitely, I can't answer that question. I don't recall definitely. I wouldn't want to hazard a guess.

5528 Q. Don't you recall that there was quite a period of time between your talk with Kelley and your actual firing of Stremble? A. There may have been, but I can't place definitely what it was.

Q. Well, wasn't the most important reason for your first discharge of Stremble, not what Mr. Kelley had said in his conversation to you, but what your salesman Horne had said by way of complaining against Stremble? A. Well, they both might be contributing factors to the conclusion I reached. Stremble's practices were contrary to our sales policy. We didn't condone that, and we just concluded it would be better to get him out of the picture.

Q. Now you went right on paying commissions to all of your other salesmen who were working on commissions after you fired Mr. Stremble, didn't you? A. That is correct.

Q. You didn't make any change in your commission set-up other than as respects Stremble, did you? A. No sir, that was the only one.

Q. After the lapse of a year or two subsequent to 1936—

Mr. Steffen: (Interposing) Excuse me, Mr. Bromley. Those questions with regard to commissions applied to board or plaster?

By Mr. Bromley:

5529 Q. You understood that my questions were addressed to your salesmen who were selling board on commission? A. I assumed as much.

Q. That is the fact, isn't it? A. They were selling all of our products, all on a commission basis.

Q. Including board? A. Including board.

Q. And that practice you never changed? A. We never changed it.

Q. Now a year or two after 1936, and after you had fired Stremble, you re-hired him, didn't you? A. That is right.

Q. And he went to work for you on a commission basis again? A. That is right.

Q. And then it was that you heard from Mr. Lenci? A. That is right.

Q. Now didn't Mr. Lenci merely tell you that he had heard that Stremble was approaching some Ebsary customers and offering to split his commission with them? A. I can't recall definitely the subject of the conversation. That would be rather difficult to answer.

Q. Well, did he say anything more than that he had

heard that Stremble was soliciting Ebsary's cus-
5530 tomers and offering to split commissions? A. That was substantially what he said.

Q. He didn't mention anything about any license agreement, did he? A. Oh, no, he did not.

Q. Or any complaint from USG or anybody else about it, did he? A. No, he did not.

Q. And he certainly didn't mention Board Survey, did he? A. No, he did not.

Q. And you thereupon decided that Stremble was up to his old practices again, and determined to fire him again, didn't you? A. Well, he had gotten into difficulties with Horne again too.

Q. Oh, he had? You mean by that that you had had another complaint from Horne before you fired him the second time? A. With Horne; it was a continuous thing. He was a thorn in his side continuously.

Q. Stremble was a thorn in Horne's side continuously? A. Yes.

Q. That is what Horne thought Stremble was; is that right? A. That is right.

5531 Q. And that is what Horne told you that he thought Stremble was, isn't it? A. Yes sir.

Q. And wasn't that the principal reason that you fired Stremble the second time? A. Whether it was the principal reason or not, we fired him.

Q. That was a reason? A. It was a reason, yes.

Q. Wasn't it the most important of all the reasons you had? A. Well, it was a pretty good one.

Q. It was a pretty important one, wasn't it? A. I would think so.

Q. Have you got Exhibit No. 597 in front of you? A. Yes, sir, I have.

Q. By the way, you knew, did you not, that in 1938 this practice of Stremble of giving rebates by splitting commissions involved the possibility that your company might be held for a violation of the Robinson-Patman Act? A. Yes, there was always that danger.

Q. You knew about the Robinson-Patman Act, didn't you? A. Oh, yes.

Q. And wasn't that another reason why you de-
5532 termined to fire Stremble? A. As far as split commissions, yes, that would be a very definite reason.

Q. A violation of the Robinson-Patman Act was a crime, wasn't it?

Mr. Steffen: I don't think that you should ask the witness concerning whether a violation of a law constitutes a crime or constitutes a misdemeanor, or what not. It seems to me that calls for a conclusion and is not appropriate.

Justice Stephens: Well, if he knows, or knew at the time, that it was, or thought it was, it would bear upon the action that he took in discharging Stremble. So it is not bad as a conclusion in the usual sense, Mr. Steffen. The Court of course isn't taking the witness' construction of the statute. The Court is permitting cross-examination testing the reasonableness of and reasons for the witness' action. The objection is overruled.

By Mr. Bromley:

Q. Can you answer that, sir? A. Will you repeat the question?

(The reporter read the question as above recorded.)

The Witness: Yes, I would think so.

By Mr. Bromley:

Q. And didn't that influence you in your decision to get rid of Mr. Stremble? A. It is quite possible.

5533 Q. Now looking at the second paragraph of Exhibit 597, do you see that sentence:

"As you know, all gypsum board is manufactured and sold under license agreement, and we have to adhere rigidly to the terms."

A. Yes sir, I see that.

Q. When you wrote that you knew you had no license agreement, didn't you? A. Oh, yes.

Q. What? A. Yes, I did.

Q. And didn't you write that sentence to Stremble as a sort of an excuse for getting rid of him? A. It might have been as good as any.

Q. Well, that is why you wrote it, isn't it? A. As I indicated before, it was probably as good as any excuse to get rid of him.

Q. You never at any time, Mr. McCormack, received a USG licensee bulletin, did you? A. No sir, I did not.

Q. Wasn't it necessary at all times during your relationships with USG, Ebsary and Kelley, that you know in advance the dealer price for patented board, of your suppliers? A. Yes, it was.

Q. And what was the reason for that? A. We
5534 had to know what it was going to cost us, or what commissions would apply in various areas. There were variable prices applying.

Q. And the price which you paid USG or Ebsary or Kelley was the dealer price of those organizations, on which your discount was figured, isn't that right? A. That is right.

Q. So wasn't a reason why you asked for and received price lists, because you wanted to know what the board would cost you before you made contracts for its resale? A. We had to know what the board was going to cost us.

Q. And wasn't that a very important reason why you got the price lists of your suppliers throughout this period. A. It would be one of the reasons.

Q. Did you ever attend a meeting of the licensees, or the licensees with the licensor, in your life? A. No sir.

Q. And did you ever know of anyone investigating your resale prices, or your resale practices? A. Not to my knowledge, no sir.

Q. Did anyone ever police or attempt to police either your resale prices or practices? A. Not to my knowledge.

Q. Did you ever make any attempt to conceal the fact that Structural employed commission salesmen? A.
5535 I don't believe we did, no.

Q. Or that Structural sold to jobbers at a discount? A. I don't recall any effort of concealment.

Q. Or did you ever attempt to conceal the fact that Structural sold in small quantities, whatever the dealers wanted to buy, and permitted them to pick that up at your mill? A. I don't recall any.

Q. Did you ever receive any threats, direct or indirect, that the Structural Gypsum Corporation had to resell its board at the suppliers' prices, or on their terms and conditions? A. I could never honestly testify that any supplier ever made such a demand.

Q. Now will you tell me the difference, briefly, between a masons' supply dealer and a lumber dealer? A. A masons' supply dealer usually is found in the larger cities, selling what they call "hard" materials—cement, plaster, lime, stone aggregate, and sand; as compared with a lumber dealer, who, as the name would imply, sells lumber, window sash, and things that the carpenter uses, as against the masons' supply dealer, who usually sells supplies that the mason uses.

Q. The lumber dealer would handle wallboard, whereas the masons' supply dealer would not, isn't that right? A.
The lumber dealer would handle most of the wall-
5536 board, yes. You might find an isolated instance of a masons' material dealer doing that, but customarily it would be the lumber dealer.

Q. And the masons' supply dealer would handle both lath and plaster? A. That is right.

Justice Stephens: If you have a number of other questions, we will have to take the afternoon recess.

Mr. Bromley: I am through, your Honor.

Justice Stephens: Have you any redirect examination?

Mr. Steffen: Yes, your Honor, we may have as much as ten minutes, unfortunately.

Justice Stephens: Well, that may mean recross-examination. We are sorry to have to ask you to come back tomorrow—I assume you are a very busy businessman—but our work is only about half over. We have to read all this yet tonight, Mr. McCormack, and go over these exhibits, so we will have to ask you to come again tomorrow.

The Witness: All right, sir.

Justice Stephens: Announce the recess.

(Whereupon a recess was taken at 4:00 o'clock p. m. until 10:00 o'clock a.m. of the following day.)

5537 IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA,

Plaintiff,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS,

Defendants.

Seventh Floor,
Internal Revenue Building,
Washington, D. C.,
Tuesday, March 28, 1944.

The above-entitled cause came on for further hearing at 10:00 o'clock a. m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

APPEARANCES:

(Same as heretofore noted.)

5544 Thereupon, HARRY G. MCCORMACK the witness on the stand at the time of adjournment, resumed his testimony as follows:

Redirect Examination

By Mr. Steffen:

Q. I have only three or four questions, Mr. McCormack. Yesterday, Mr. Bromley, at page 5807 in the record, asked you some questions concerning the competi-
5545 tion with your suppliers, and I think you testified that you solicited the same trade as your suppliers of board did, which would be Ebsary and United States Gypsum Company and the Kelley Plasterboard Company, and that there was open competition between you and your suppliers; also, that the competition was very vigorous. Do you remember that? A. Yes, I do.

Q. Do you differentiate in your answers, Mr. McCormack, between price competition and any other kind of competition? A. Well, that would be sales competition.

Q. And by "competition", what did you mean—that there was price cutting, or was it sales competition? A. Well, I am not aware of any price cutting. It was more the direct sales effort, the number of salesmen who were competing with our salesmen, and just general competition.

Q. But did you mean to say that the prices of board varied? A. I don't believe so.

Q. Would that be true of plaster? A. Yes, it would be.

Q. Plaster prices were stable? A. I think so.

Q. At this time? A. (No response.)

5546 Q. Now at transcript page 5810, Mr. Bromley asked whether or not your company employed jobbers, do you remember that? A. I believe so.

Q. And your testimony was that you had jobbers more or less through all this period? A. We did.

Q. Did those jobbers sell both board and plaster? A. They did.

Q. And there has been testimony here to the effect that the margin of profit was very low, under a 12-1/2 or 15 percent discount, and that it wouldn't admit of having jobbers. What do you say as to that? A. Well, in our jobbing arrangement, we split our commission with the jobber.

Q. And what territories did the jobbers serve, immediately around your plant at Linden—

Justice Stephens: (Interposing) When you use the word "commission" in that instance, you mean discount, do you?

The Witness: Yes.

The one that comes to mind is the Union Materials Company of Baltimore.

By Mr. Steffen:

Q. And did they job both plaster and board for you? A. Yes, they did.

5547 Q. And did you split your commission or discount with them, in jobbing board? A. On board, we did, yes.

Q. Now there was a question concerning bulletins, and you testified that you received price lists from Kelley? A. Yes.

Q. And that in the years 1936, 1937 and 1938, or thereabouts, you bought board from the United States Gypsum Company, do you remember that? A. That is right.

Q. Did the United States Gypsum Company supply you with price bulletins? A. Not that I recall.

Q. And in selling their board, at what prices would you sell?

Mr. Bromley: I object to that. I think the invoices are the best evidence as to what the prices were.

Justice Stephens: Objection sustained.

By Mr. Steffen:

Q. What was your policy in selling their board, as respects prices? A. We knew the prices that applied—in fact, we had Kelley's price lists. We would just use those as a guide.

Q. Now, coming to this Stremble matter, you will remember that in your direct testimony you testified
5548 that on the second occasion when Mr. Stremble was in trouble, you had a conversation with Mr. Lenci.
A. Yes.

Q. And you testified that either at the time of that conversation, or at some other time—and you weren't sure about that—Mr. Lenci had told you he was operating under restrictions under the license agreement. That appears on page 5792 of your testimony. Do you remember that? A. I think—

Mr. Bromley: (Interposing) Just a moment—

Mr. Steffen: (Interposing) May I show the witness his testimony on this point?

Justice Stephens: Yes.

Mr. Steffen: Read from page 5792 over to page 5793.

(Transcript handed to the witness.)

Mr. Bromley: May his attention, if the Court pleases, be called to his cross-examination at page 5820, line 24, to page 5821, line 6?

Mr. Steffen: Your Honor, what I was wanting to do was to do just what Mr. Bromley suggested, to compare those two bits of testimony, because there is an apparent inconsistency.

By Mr. Steffen:

Q. Will you, then, Mr. McCormack, now look at your testimony on page 5820, at which point Mr. Bromley asked you some questions concerning what Mr. Lenci said?
5549 A. Yes, sir.

Q. Have you read your testimony, Mr. McCormack? A. Yes.

Q. You said, on page 5820, in answer to Mr. Bromley's question, that Mr. Lenci made no mention of operating under a license agreement, and in your earlier testimony you stated that he did at some time. Can you clear that up?

Justice Stephens: You had better say, to make the record clear, "at pages 5820 and 5821".

Mr. Steffen: Yes, particularly at page 5821.

By Mr. Steffen:

Q. And in your testimony at page 5792, on your direct testimony, you testified that Mr. Lenci said to you, either at this time or some other time, that he was operating

under restrictions under the license agreement, as respects commission salesmen. A. At some time he did.

Q. Can you testify as to whether it was at this time, or when? A. I wouldn't know.

Q. Can you be sure of your answer, then, to Mr. Bromley on page 5821, in which you said that he made no mention of the license agreement? A. That is most difficult to answer. Frankly, I don't know.

5550 Q. And when you say that, you mean you don't know whether he said it at this time or at some other time? A. Yes; frankly, I don't know.

Q. Then you would like to modify your answer on page 5821 to say that you were not sure whether he did or didn't say anything at that time—is that correct—about the license? A. I think that that would be a fair answer.

Mr. Steffen: That is all, Your Honor.

Justice Stephens: Any re-cross?

Recross Examination

By Mr. Bromley:

Q. In your testimony about plaster prices, Mr. McCormack, you didn't mean to say that plaster prices didn't change from time to time during this period, did you? A. What period do you refer to, Mr. Bromley?

Q. Well, I understood you were referring to the whole period that you were with the Structural Company. A. Oh, plaster prices changed considerably during the entire period. I thought you had reference to some particular period.

Mr. Steffen: I thought the reference was to the years 1936, 1937 and 1938, in my question.

By Mr. Bromley:

Q. How did you understand Mr. Steffen's ques-
5551 tion,—to be limited to 1936, 1937 and 1938, or to apply to the whole period that you were with the Structural Company, so far as plaster prices were concerned? A. I assumed that he was referring to Stremble, and so far as I know, without referring to the record, I imagine our prices were the same. During the entire period that we sold plaster, there were many, many price changes.

By Mr. Bromley:

Q. And there were many price changes in plaster prices during the years 1936, 1937 and 1938, weren't there? A.

Possibly so. Without referring to the record, I can't say definitely. I wouldn't be surprised if there were.

Q. And when you say "possibly so", you mean your best recollection is that the price of plaster did change during the years 1936, 1937 and 1938, don't you? A. I wouldn't know definitely without referring to the record, but if you say they did, I will accept that statement that they did.

Q. Isn't your best recollection, Mr. McCormack, that they did change during the three years mentioned, 1936, 1937 and 1938? A. I wouldn't be surprised if they did.

Q. You mean by that answer that your best memory is that they did change, don't you? A. To be sure, I would have to refer to the records.

5552 Q. So you don't remember as to whether they changed in the years 1936, 1937 and 1938; is that right? A. I honestly don't.

Q. Now, in one of your answers to a question by Mr. Steffen this morning, in connection with whether you received USG price lists, you said that you had Kelley's price lists, and you therefore knew the prices that applied.

Now you didn't mean, in your use of the word "applied", to suggest that the Structural Company had any obligation or arrangement or understanding to follow either the USG or the Kelley or the Ebsary prices in its resales, did you? A. We had no obligation, no.

Q. By the way, on page 5810, in line 18, I asked you this question:

"Q. Now it is the fact that you knew at all times that you were not bound to charge any particular price for board, or to follow any particular terms of sale on board—that is the fact, isn't it?"

And you said:

"A. We never felt that we were under any definite obligation, no."

Now when you used the word "definite", you didn't mean to qualify your answer, did you? A. No, I don't believe so.

5553 You must remember that we were dependent upon others to supply us with board, and just as good business practice we felt it incumbent upon ourselves to get as good a price as they got. As I told Mr. Steffen yesterday, we couldn't undersell our source of supply and expect them to continue furnishing us with board, that was just common business sense.

Q. So that, when you said "We never felt that we were under any definite obligation", all you meant was that you had no obligation of any kind, isn't that right? A. I never felt we had.

Q. Nor did you have any agreement or understanding of any kind, with respect to your resale prices or practices—isn't that right? A. That is correct.

Q. And when you said, Mr. McCormack, yesterday—and I think again today—that you could not honestly testify that you had any obligation to follow your suppliers' prices, you didn't mean to qualify your answer, or your statement, that you had no obligation of any kind, did you? A. No, we had no obligation.

Q. And when you used the word "honestly", that was just your method of saying that you had no obligation or agreement or arrangement or understanding of any kind; isn't that right? A. I would say that that is correct, yes.

Q. And you have no reservation in that answer
5554 whatsoever, have you? A. No, I have not.

Q. Now, at page 5804, in your cross-examination, I asked you this question:

"Q. And you knew that your company was not bound by any minimum prices on patented gypsum board, fixed by USG?"

And you answered:

"A. We never accepted that we were."

Then I said:

"Q. Well, you knew as a matter of contract that you had no contract with USG whatsoever, isn't that right?".

And you said:

"A. We had no contractual obligations."

Now, you meant by those answers that you had no obligations, arrangements or understandings of any kind, with respect to what prices you should charge on your resales of patented board; isn't that so? A. That is correct.

Q. Then at page 5812, at line 10, Mr. McCormack, I asked you a question which I think you did not answer, as follows:

"Q. Were you ever told that any conditions had been attached by USG to any consent which it had granted Ebsary or Kelley to sell you at a discount?"

And you said:

5555 "A. Frankly, I didn't know until quite late in this picture that we ever were selling under a consent."

Mr. Steffen: I think, Your Honor, that this, at least, goes beyond the scope of proper re-cross-examination. I don't recall anything that prompts such a question, at this time. I think several of the questions that have already been asked have gone too far.

Justice Stephens: Well, I think that that is strictly true; but at the same time, I noticed in reading the record that that question was left unanswered. I think the Court would like to have an answer to it.

Mr. Steffen: Is that to be considered as cross-examination and not re-cross?

Justice Stephens: Yes, as cross-examination and not re-cross.

By Mr. Bromley:

Q. Now, will you direct your attention to the question beginning at line 10:

"Q. Were you ever told that any conditions had been attached by USG to any consent which it had granted Ebsary or Kelley to sell you at a discount?"

Will you answer that question, please? A. Well I attempted to answer it, beginning in line 13. I learned of the consent eventually—whether it was at the last trial or just when, I don't know—but frankly, I didn't know that
5556 they were selling us under a consent.

Q. Yes, sir.

Now at any time, even after you learned about the consent, you were never told that there were any conditions attached to that consent by USG, were you?

Mr. Steffen: Your Honor, I think the question has now been answered, and this goes on into a subject which is certainly not proper re-cross, and is wasting time.

Mr. Bromley: Well, it may be, but I still haven't got an answer out of the witness, and I would like to have him answer the question, if I can get him to.

Justice Stephens: It will be treated as cross-examination. I would like to have a direct answer to the question. I think the witness—who I am sure intends to be entirely frank—perhaps doesn't see at first glance that the answer is only an answer upon implication rather than a direct answer to the question, and I think it is important that we should know about it, if he is willing to answer it directly.

The Witness: All I can say is that if I didn't know there was a consent, I wouldn't know what obligations were imposed.

By Mr. Bromley:

Q. Then you never had any information, at any time, Mr. McCormack, that any conditions to the consent had been imposed by USG on anybody; isn't that the fact? A.

5557 I didn't know it until it came up either at the last trial or in the grand jury proceedings.

Q. Well, now, you say you "didn't know it". When you say that, you mean you didn't know that there was such a thing as a consent—isn't that what you mean? A. That is right.

Q. I am asking you to forget all about whether you knew there was a consent or whether you didn't know; and I am merely asking you this simple question; Did anybody, at any time, ever tell you that USG had attached any conditions to any consent which it may have granted any one of its licensees to sell you? A. No, they did not.

Q. Now, sir, will you turn to page 5824, and to the question beginning in line 12. There I asked you:

"Q. And didn't you write that sentence to Stremble as a sort of an excuse for getting rid of him?"

And you said:

"A. It might have been as good as any."

Mr. Steffen: I object, Your Honor, to any questions based upon—

Justice Stephens: (Interposing) He hasn't asked a question yet.

Mr. Steffen: I say I am now objecting to any questions based upon that, as going beyond the scope of proper
5558 re-cross examination.

Mr. Bromley: Well, of course, he isn't even sound about that, because he inquired about the Stremble incident on re-direct.

At any rate, I ask leave now to cross-examine on this subject, because I again believe that the record is not clear, and neither one of the two questions, either the one at line 12 or the one at line 15, was answered.

Justice Stephens: The Court would like to have a direct answer on that, and will, in its discretion, permit further cross-examination on that subject, which means that you can conduct re-direct on it yourself, if you wish to, Mr. Steffen.

By Mr. Bromley:

Q. Have you read those two questions and the answers that you gave there between lines 12 and 17, Mr. McCormack? A. Yes, I have.

Q. And you know what the sentence is that we are talking about, don't you? A. I think so.

Q. That sentence is quoted up at the top of page 5824, beginning at line 3 and ending at line 5, isn't it? A. That is right.

Q. Now, didn't you write that sentence to Stremble merely as an excuse or an alibi, and not because it stated the true facts?

5559 Justice Stephens: You may look at the letter itself, if you wish to.

The Witness: I think I am familiar with it, Your Honor, with this statement.

It is rather difficult to recall the mental processes one would go through to arrive at a decision to fire a man. As I indicated, Stremble was sort of a bad boy, and there undoubtedly were a number of reasons at the time, and an accumulation of things, and possibly this is one of the reasons that helped me reach that conclusion.

By Mr. Bromley:

Q. But, Mr. McCormack, look at the sentence, and that part of it quoted at lines 4 and 5 of this page. You didn't have to adhere rigidly to the terms of any license agreement, did you? A. No, we didn't have any license agreement.

Q. And you knew you didn't have to adhere rigidly, or otherwise, to the terms of anybody else's license agreement, didn't you? A. That is correct, because we didn't have one.

Q. All right, sir, I know you didn't have any, but you knew that Structural didn't have to adhere to the terms of anybody else's license agreement, didn't you? A. That is right.

Q. Well, then, when you wrote that you did have to
5560 adhere rigidly to the terms, you were stating something that you knew wasn't so, but you were just using it as an excuse to get rid of Stremble—now isn't that the plain fact, sir? A. Well, it is quite possible, as I indicated to you yesterday, that I did use it as an excuse, because I was under no obligation with our suppliers.

Q. When you say it is quite possible that you did use it as an excuse, you mean that your best recollection is that that is what you did do, don't you? A. I might say yes.

Q. Now, you have told us that you can not say now when it was that Lenci mentioned his license agreement to you. Regardless of the time that he mentioned it to you, what is your best recollection as to what he said about it? A. About the license agreement?

Q. Yes, sir, in connection with the Stremble incident. I will withdraw that question.

What is your best recollection as to what Lenci said to you about his license agreement? A. He said several things to me. If you have in mind about commission men, he told me that under the license agreement his company could not sell through commission salesmen.

Q. Did he say anything more than that? A. I can't recall that he did.

Q. But you don't know when that was, is that
5561 right? A. I can't place it, no.

Mr. Bromley: That is all.

Justice Stephens: Any re-direct?

Redirect Examination

By Mr. Steffen:

Q. I want to refer, Mr. McCormack, again to your testimony on page 5824 in regard to your letter to Mr. Stremble. You say in the quotation appearing at the top of page 5824 that you had to "adhere rigidly to the terms" of the license agreement. You answered, to Mr. Bromley, that you had no license agreement. Do you recall that? A. That is right.

Q. Is it possible that when you said that you had to adhere rigidly to the terms, that you meant you had to adhere to the prices which Mr. Kelley furnished you? A. We were under no obligation to, Mr. Steffen.

Q. By "obligation", do you mean legal obligation? A. Well, even a moral obligation.

Q. You have testified as to your general policy. A. It was politic for us to observe Kelley's prices simply as a medium for us to continue our source of supply.

Q. And would you say that that policy meant that you had to adhere rather rigidly to Kelley's prices?

Mr. Bromley: I object to that as incompetent because calling for a conclusion as to what it meant. He can
5562 ask him what it was, but not what it meant.

Justice Stephens: The objection is overruled. We think that it is a conclusion in a sense, but it is a kind of a conclusion that this business man would be able to draw, or the kind of a word he would be able to use in describing their price policy.

Mr. Steffen: Will you read the question?

(The question was read by the reporter.)

The Witness: As a general thing, we didn't adhere rigidly.

By Mr. Steffen:

Q. Would that afford any explanation of what you meant in your letter here? A. I don't quite get what you mean.

Q. You have testified, I think, that your policy was to follow Kelley's prices? A. That is right.

Q. And that you felt it was bad business practice to undercut Kelley? A. That is right.

Q. Did you follow that policy rigidly, is what I am suggesting or asking?

Mr. Bromley: I think that calls for a conclusion. I object to it.

Justice Stephens: Read the question. Isn't that
5563 exactly the same question that was asked before?

Mr. Bromley: I think it is, and probably it has been answered. I object to it as repetitious.

Justice Stephens: That objection is sustained.

By Mr. Steffen:

Q. Well, Mr. McCormack, have you any other explanation of the phrase "adhere rigidly to the terms" of the license agreement, than you have already offered? A. We did not have a license agreement, but it was common knowledge in the industry, and in the trade, and every lumber dealer and every mason materials dealer knew of the existence of the license agreement. All I can say is that that term, or that phrase, was at times bandied around rather recklessly.

Justice Jackson: Can't you say whether or not you meant it or didn't? Why don't you come out directly and say, "I didn't mean this" or "I did mean this", one or the other?

The Witness: Well, I didn't mean it, because we did not have an obligation, Your Honor.

Justice Jackson: Then say so, "I didn't mean it"; or, if you did mean it, say, "I did mean it."

The Witness: I didn't mean it, because we had no obligation.

Justice Stephens: It is an important part of this aspect of the case. If you were bound, or felt that you were
5564 bound, or acted as if you were bound, by some agreement with your suppliers or by some agreement that they had, that is a fact that we ought to know. On the other hand, if, humanly, you were just saving your face with this fellow by using that phrase, in order to get rid of him, we would like to know that.

The Witness: Well, as I look back upon it now, we had a salaried salesman in the territory. This man Stremble was just doing a little sort of extracurricular sales work. Stremble was continuing to sell in that territory because he represented manufacturers other than ourselves, he was selling cement, lime, and sewer pipe. And Horne, who was our regular salesman, would still have to come in contact with Stremble. I couldn't use Horne as a medium or excuse—his complaint, I mean—I couldn't use Horne's complaint to tell Stremble that that was the basis of it. He then might have taken it out on Horne.

As I look back upon it now, that is the way I see it.

Justice Stephens: Very well, I think you have made it clear what your state of mind was.

Is there anything further, gentlemen?

Mr. Steffen: No, Your Honor.

Mr. Bromley: That is all.

Justice Stephens: I forgot to ask whether any other defendants intended any re-cross-examination of this
5565 witness. If they wish, they may have that opportunity now.

(No response.)

Justice Stephens: We will take the morning recess at this time.

May this witness be excused?

Mr. Bromley: Yes, Your Honor.

Mr. Steffen: Yes, Your Honor.

Justice Stephens: Thank you, Mr. McCormack, for attending the court.

The Witness: Thank you for your consideration.

(Witness excused.)

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

5566 Justice Stephens: The Court will now rule, before taking up the evidence of another witness, upon the motion to strike Government Exhibit No. 324.

Where is Mr. Adams?

Mr. Bromley: Mr. Adams has gone over to the Department of Agriculture. (Laughter).

Justice Stephens: We didn't want to interrupt a witness, but we will have to postpone this now until Mr. Adams returns.

Call the next witness, please.

Mr. Steffen: Mr. Kellogg.

Justice Stephens: How long do you expect this witness' testimony to take?

Mr. Steffen: About ten minutes, or possibly fifteen.

Thereupon, WILLARD H. KELLOGG, JR. appearing as a witness for and on behalf of the United States, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Steffen:

Q. Would you state your name in full, Mr. Kellogg. A. My name is Willard H. Kellogg, Jr.

Q. Where do you live? A. New Haven, Connecticut.

5567 Q. What company are you connected with? A. The Connecticut Adamant Plaster Company.

Q. How long have you been with them? A. Well, the company was organized the year after I was born, and I have grown up in it.

Q. What is your capacity with the company now, what office do you hold? A. Secretary and Treasurer.

Q. What does the company do, Mr. Kellogg, what does it manufacture? A. It manufactures wall plaster.

Q. What type of wall plaster, neat and sanded? A. Neat and sanded and plaster of Paris.

Q. And where does the company get its gypsum rock? A. From Nova Scotia.

Q. Do you own your source of supply? A. Yes sir.

Q. And what process do you have in New Haven, a calcining process? A. Yes sir.

Q. Do you make your plaster and sell it under your own name? A. Yes sir.

Q. Your own trade name? A. Yes sir.

5568 Q. Do you have a source of supply for board? A. Yes sir.

Q. And do you sell board and lath, plasterboard and lath? A. We do.

Q. What is your source of supply for board? A. At the present time?

Q. Yes. A. The United States Gypsum Company.

Q. And for how long have you been buying board from United States Gypsum Company? A. For about ten years.

Q. For about ten years? A. Yes sir.

Q. And your prior source of supply? A. The Ebsary Gypsum Company and the Kelley Plasterboard Company.

Q. Is it necessary or important in your business to have a source of supply for board and lath? A. We think it is.

Q. And would you tell us why? A. A split sale is difficult to make. If somebody else sells the lath, they are apt to sell the plaster with it. We want to sell the plaster.

Q. You would say it is important, then, as re-
5569 spects your sale of plaster, that you also have the ability to sell lath? A. Yes.

Q. Are you familiar with the fact that the board and lath is a so-called patented article? A. I am now.

Q. How long have you been familiar with that? A. Are you referring to licensing?

Q. Well, that would be my next question. A. I heard of that first in the grand jury investigation.

Q. And you didn't know that prior to that time? A. No sir, I did not.

Q. In buying lath and board from United States Gypsum Company, how do you have it delivered? A. Carloads and truckloads.

Q. And it is delivered to your place, or to your dealers? A. Both ways. We carry a stock, which is delivered to our plant; we also have it delivered direct to our dealer-customers.

Q. And do you receive a discount from United States Gypsum Company? A. Yes sir.

Justice Garrett: Will you speak a little louder, please, Mr. Witness?

The Witness: Yes, your Honor.

5570 By Mr. Steffen:

Q. What is that discount? A. In carload lots, into our warehouse, on the lath it is twelve and a half percent, and on big board, long board, it is 15 percent. On truckload lots direct to our dealer-customers, it is 10 per cent.

Q. What price is that discount figured upon? A. The mill-base price at the mill from which the shipment is made.

Q. In selling to your customers, do you require the prices from the United States Gypsum Company? A. Yes, at times, whenever we need them.

Q. Why do you do that? A. In order to know what price to sell at, what the market price is.

Q. And who do you talk with at the United States Gypsum Company? A. Anybody that answers the phone.

Q. Do you know anyone by name? A. You mean over the last period of ten years that we have been doing business there?

Q. Yes. A. It would be a long directory.

Q. Well, let's have whoever you remember. A. Martin Powers was one of the earliest men I talked
5571 to there. There is a man called Barnett there now that I talk to on the phone.

Q. And what were your conversations with them about? A. Do you mean in any particular instance?

Q. Yes. A. Well, if I had an inquiry from a customer in a town in which I had not previously made a sale, I would ask what the delivered price was to a dealer at that point of delivery.

Q. And why would you want to know that? A. To know what I had to pay for it.

Q. And what would your policy be with respect to selling at the prices you obtained from United States Gypsum Company? A. My policy is to sell at those prices.

Q. Now I think you testified that you had a previous source of supply in the Ebsary Gypsum Company, is that correct? A. Yes sir.

Q. And that was back during what time? A. In the early 30's, 1931 or 1932.

Q. Did you ever have a conversation with Mr. Lenci concerning your relations with the Ebsary Gypsum Company? A. I think the business I did was done with Mr. Lenci.

Q. Was he ever at New Haven? A. Oh, yes.

Q. Do you recall a conversation with Mr. Lenci at any time concerning the territory in which you might sell
5572 board? A. When we first bought of the Ebsary Gypsum Company there was no question of territory, we bought merely for delivery at New Haven. Eventually we wanted deliveries to other points in Connecticut. Mr. Lenci explained to me at that time that he had salesmen traveling in Connecticut, and he wanted to limit my purchases to deliveries to New Haven.

Q. And did he mention Bridgeport in connection with that matter? A. That was the particular incident that brought up the point I have just made.

Q. What did he say about Bridgeport? A. That he had salesmen covering that territory who could handle the business there, and he didn't want to sell me at that point.

Q. And did you subsequently—and I think you have already testified that you did—change to United States Gypsum Company as a source of supply? A. Yes sir.

Q. Was that fact one of the reasons why you made the

change, Mr. Lenci's conversation with regard to Bridgeport? A. Yes, because we were looking for a source of supply that would ship where we wanted them to ship.

Mr. Steffen: We have no more questions, your Honor.

Justice Stephens: Cross-examination?

5573 Cross-Examination

By Mr. Bromley:

Q. You said that your discount was figured on the mill base price, Mr. Kellogg, is that right? A. That is what I understand it to be, sir.

Q. Now the mill base price is the mill base price charged to dealers, isn't it? A. The only price I know is the dealer price, I know of no other type of price.

Q. So when you talk about the mill base price, that is the same thing as saying the dealer price? A. Yes sir.

Q. And you always wanted to know what the dealer price was, because, as you say, that was what the board cost you? A. Yes sir.

Q. And you meant by that, that the board cost you the dealer price less the applicable discount therefrom, did you not? A. Yes sir.

Q. Now you said you also wanted to know your suppliers' prices, in order to know the price to sell at. Do you recall that? A. Yes sir.

Q. Did you at any time have any understanding or agreement or arrangement with anybody as to the resale
5574 prices which you would charge in your resales for board and lath which you bought? A. No sir.

Q. And you determine this policy of which you speak, independently, without relation to any understanding with anybody whatsoever? A. With anybody, yes sir. It was a policy of a long standing in our company.

Q. And it was not the result of any arrangement or agreement or understanding with anybody, was it? A. With anybody in the gypsum business, no sir.

Q. And you have always been free at all times to sell your products at whatever prices you wanted, have you not? A. Yes sir.

Q. So far as you know, or are aware of, has anybody from USG, or Ebsary, or Kelley, or anybody else, ever investigated or checked up on your resale prices on gypsum board? A. The only knowledge that I have of that was brought to my attention in the grand jury proceedings, where the Board Survey Company was named. It was the

first time I had ever heard of it. Nobody from the gypsum companies has ever come to me to investigate any prices.

Q. And nobody from Board Survey ever came to you, as far as you knew, to investigate your prices, did they? A. I never heard of them.

5575 Q. Now, has anybody from the United States Gypsum Company or from any other board manufacturer ever threatened to cease to sell you on account of the prices which you charged or did not charge in your resales of board? A. No sir.

Q. Had you ever heard of the Board Survey Company prior to the grand jury investigation? A. I never had.

Q. And you never received, then, any communications, written or oral, from it, did you? A. No sir.

Q. Did you ever attend a meeting of United States Gypsum Company representatives and representatives of its licensees at any time? A. No sir.

Q. There has been testimony received in this case with relation to the Southbury Lumber Company and the New Haven Reserve Company—do you recall those two companies? A. Yes sir.

Q. Were they customers of yours at some time? A. I think they still are.

Q. And they have been for some time? A. They have been over a good many years.

Q. Now did Mr. Lenci ever come to you and ask you if you had sold to the Southbury Company or the New

5576 Haven Reserve Company at any time? A. No sir.

Q. And did he or anybody else from Ebsary or USG ever ask you or inquire of you as to at what prices you had sold those two customers at any time? A. No sir.

Q. So that I take it your testimony is that nobody at any time from any manufacturing company ever came to you and asked you any questions with respect to your sales, or your sales practices, so far as New Haven Reserve or Southbury Lumber were concerned, is that right? A. That is right.

Q. And now will you give us the reasons why it was the policy of your company to sell, as you have indicated, whenever you were able, at about the prices charged by your supplier of patented board? A. Because we could get as great a price as the supplier, and there was no reason to take less. That was our policy.

Q. Could you get more than the supplier was charging for his board? A. I should doubt it very much.

Q. And is that the reason why your company sold, whenever it was able, at the same prices as were charged
5577 for the board by your suppliers? A. Yes sir.

Q. Was the board which you bought marked with your trademark or the trademark or trade name of the supplier, in each instance? A. With the trade name of the supplier.

Q. You never sold board or lath under your own trade name or trademark, did you? A. No sir.

Q. You always sold it under the trade name or trademark of the supplier from whom you were buying at the time, didn't you? A. That is correct.

Q. Now do you buy products other than gypsum board and lath at a discount from manufacturers? A. Yes sir.

Q. Such as what?

Mr. Steffen: I think that this going beyond the direct examination, your Honor.

Justice Stephens: I am inclined to think it is proper, Mr. Steffen, because you had him generally describe his business. The objection is overruled.

The Witness: Yes sir, we do.

By Mr. Bromley:

Q. And what products do you buy from manufacturers at a discount, other than board and lath?
5578 A. Sewer pipe, flue lining, face brick, lime, insulating wool.

Q. And it is the fact, isn't it, that most of those products you have named are made by companies other than United States Gypsum Company? A. Yes sir.

Q. What is your policy with respect to the prices that you charge in your resales of those materials? A. Just the same as it is with our policy on the sales of board. We follow the market and retain whatever discount we can get as a distributor.

Q. You mean by that answer to say that it is your policy with respect to those materials which you have mentioned, other than board and lath, that you sell them at the same prices which are charged to dealers by your suppliers? A. Yes sir.

Q. That has always been your policy, has it? A. It has.

Q. And there is no difference between that policy and the policy which you follow in your resales of gypsum board and lath, is there? A. No sir.

Mr. Bromley: That is all.

Justice Stephens: Is there any further cross examination by other defendants?

5579 (No response.)

Justice Stephens: Is there any redirect?

Mr. Steffen: We have no redirect, your Honor.

Justice Stephens: You are excused, Mr. Kellogg. Thank you for coming here.

The Witness: Thank you, sir.

(The witness was excused.)

Mr. Knuff: Shall I call the next witness?

Justice Stephens: Yes, certainly.

Mr. Knuff: Mr. H. E. Chism.

Thereupon, H. E. CHISM, appearing as a witness for and on behalf of the United States, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Knuff:

Q. Your name is H. E. Chism, and you spell your last name C-h-i-s-m, is that correct? A. Yes sir.

Q. You live in Oklahoma City, Oklahoma? A. Yes sir.

Q. And are associated with the Texas Cement Plaster Company, is that correct? A. That is correct.

5580 Q. The Texas Cement Plaster Company is not a corporation, but is an individually owned concern, is that correct? A. That is correct.

Q. The owner of that concern is Mr. Samuel M. Gloyd? A. Yes sir.

Q. What interest does Mr. Gloyd take in the management of that concern? Is he at the office daily? A. No sir.

Q. How frequently does Mr. Gloyd come to the office? A. Well, I should say three or four times a week, and stays at least an hour, possibly two hours.

Q. Does Mr. Gloyd direct the policies and affairs of the Texas Cement Plaster Company? A. Well, not to any considerable extent now.

Q. And who does direct the policies and affairs of the Texas Cement Plaster Company? A. I do.

Q. Mr. Gloyd has delegated to you the authority to direct the affairs of the Texas Cement Plaster Company, is that correct? A. Largely, yes.

Q. Does any other person direct those affairs? A. No, they do not.

Q. Well, why do you use the word, "largely"? A. Well, with the exception of the direction that Mr.
5581 Gloyd gives the business, I take care of the balance of it.

Q. What direction does he give the business? A. As I said, very little at the present time or during the past year or two years, particularly.

Mr. Knuff: May it please the Court, in view of the fact that it is now apparent that this gentleman is, I presume you would call him, the managing agent of the Texas Cement Plaster Company, I believe that under the Rules of Civil Procedure, we are entitled to examine him as if on cross examination.

Justice Stephens: That is Rule 43 (b)?

Mr. Knuff: That is correct.

Justice Stephens: Are you a director of the Company?

The Witness: It is not a corporation.

Mr. Knuff: It is not a corporation, your Honor.

Mr. Johnston: I don't see, if the Court please, how that comes under this rule—

Justice Stephens: (Interposing) Just let me read the rule first.

Is this a partnership?

Mr. Johnston: No, if the Court please, this a wholly-owned business, owned by Mr. Gloyd.

Justice Stephens: It is a corporation?

Mr. Johnston: It is not a corporation, not a partnership, and not an association, just an individual, and he uses this trade name and Mr. Chism works for him
5582 as his manager. I don't see how it would come in under that rule at all.

Justice Stephens: Those facts are without dispute, are they, Mr. Knuff?

Mr. Knuff: That is correct, your Honor.

Justice Stephens: Mr. Gloyd is in business for himself, and he owns the business, and this gentleman, Mr. Chism, is employed by him?

Mr. Johnston: That is right, on a salary, and he has no interest in the business at all.

Under Subsection (b) of Rule 43, it is limited to, "an officer, director, or managing agent of a public or private corporation, or of a partnership or association,"—and it goes no further.

(The Justices conferred.)

Justice Stephens: Have either of you any authorities on this subject at all? We know of none. This rule hasn't been construed, to our knowledge. If you know of no authorities we are ready to rule on the matter.

Mr. Knuff: I haven't any authorities, your Honor, on the subject. I don't believe there are any authorities on it.

I will say frankly to the Court that while I don't believe we come literally within this rule, yet I think it is within the discretion of the Court.

You see we are in a very peculiar position in this case.

5583 We endeavored to get the testimony of Mr. Gloyd, and while the Court has said that we may file interrogatories, in all the 25 years that I have been at the bar, I don't know of any more unsatisfactory way of getting testimony than by interrogatories, written interrogatories. If you are going to prove a signature to a will, yes, written interrogatories are all right there. But here we have the proprietor of this business, a man of about 79 years of age, he comes to the office, according to this witness' testimony, about an hour a day, a couple of times a week, and according to what Mr. Johnston told us—and I haven't any reason to doubt it at this time—Mr. Gloyd is a pretty sick man.

The man that directs the business down there is the gentleman on the witness stand. I think that in view of the fact that we couldn't take Mr. Gloyd's deposition, that it is within the discretion of the Court to grant us this permission. We are in this position here, your Honor, that if we call Mr. Chism as our witness, and it turns out that he testifies differently than what we expect him to testify, we would not otherwise be in a position to impeach or contradict him.

As I say, in view of the ruling of the Court before, I don't think it would be any miscarriage of justice at all to indulge the Government in this request, and we ask that the Court exercise its discretion in the matter and allow us to call this witness as if on cross examination, and interrogate him by leading questions, and if necessary, to impeach him.

5584 Mr. Johnston: Now if the Court please, while I think under the rule my point is well taken—in fact I personally feel pretty sure of it—I am going to indulge the Government, and I am just going to waive the rule, so that there can't be any question about Mr. Chism—

Justice Stephens: (Interposing) Well, I think that that is a very fair thing for you to do. My own view—and I think my colleagues agree with me, Mr. Knuff—is that it is not within our discretion. I think, as you argue, that it is probably within the spirit of the rule to permit the cross examination of this witness, but this is a rule which is in derogation of the common law, which left the matter purely to discretion, and it fixes an absolute presumption of hostility, and it enumerates the persons to whom the rule applies.

Now if the rule were ambiguous, then we could consult the spirit of the rule, but since it isn't ambiguous, and clearly doesn't cover this case, I doubt if we have any discretion in the matter.

But the matter is now academic, in view of Mr. Johnston's very fair waiver.

Mr. Knuff: It is my understanding—and Mr. Johnston may correct me if I am wrong—that we may be allowed to contradict or impeach this witness, is that correct? Does your waiver go to that extent?

Mr. Johnston: I am waiving the rule.

5585 Justice Stephens: He is waiving the rule, yes.

Mr. Knuff: If the waiver goes to that extent, then all right, and we thank Mr. Johnston for his indulgence.

Justice Stephens: He is waiving what he claims to be the inapplicability of this rule to this witness, and is conceding, for the purpose of this examination, that the rule does apply.

Mr. Johnston: I have been trying at all times to help the Government in any way I could in the case, and give them a chance for their money. (Laughter.)

Justice Stephens: Very well, proceed.

By Mr. Knuff:

Q. Mr. Chism, how long have you been with the Texas Cement Plaster Company? A. Since 1922.

Q. And when you came with the Texas Cement Plaster Company, in what capacity were you employed? A. I was doing a little bit of everything, I would call it assistant to the general manager.

Q. And who was the general manager at that time? A. At that time, Mr. G. W. McGahan.

Q. Was Mr. Jacobs with the company at that time? A. No, I don't believe he was just at that time, not until two or three years later.

Q. My understanding is that Mr. Jacobs is dead,
5586 is that correct? A. That is correct.

How long have you been general manager? A. Since 1932, I believe, the early part of 1932.

Q. For the past 12 years, approximately? A. Yes.

Q. What business is the Texas Cement Plaster Company engaged in? A. The manufacture of gypsum wall plaster and gypsum wallboard and lath.

Q. Block? A. Block, yes.

Q. Both neat and sanded plaster? A. Not sanded plaster, no.

Q. Not sanded? A. No.

Q. And where is the mill of the Texas Cement Plaster Company located? A. It is at Plasterco, Texas, near Hamlin.

Q. And where does the Texas Cement Plaster Company sell its products? A. Well, in quite a wide territory in the South and Southwest.

Q. Through what states? A. Eighty percent of it
5587 in Texas, Oklahoma, Kansas, Missouri, and Arkansas. The balance is spread out over possibly 10 other states, surrounding states.

Q. When did you first start to manufacture board, and by "board" I mean board and lath? A. About the middle of 1925.

Q. And at that time I believe you did not manufacture the large board, is that correct? A. We did manufacture the large board beginning at that time.

Q. Did you manufacture lath? A. I think we manufactured some lath.

Q. I was under the impression that at one time you confined your manufacturing activities to either board or lath. I may be wrong on that. A. No, we did not.

Q. At all times you did manufacture both board and lath? A. That is my recollection now, yes.

Q. I would like, Mr. Chism, for you to look at what has been marked Government's Exhibit 599 for identification, the same being an agreement, dated the 11th day of April, 1927, between the United States Gypsum Company and the Texas Cement Plaster Company, and in particular to

have you look at page 12 and tell us whether or not that is Mr. Gloyd's signature?

5588 (The document referred to was marked as Government's Exhibit No. 599 for identification.)

(Government's Exhibit No. 599 for identification was handed to the witness.)

The Witness: Yes sir, it is.

Justice Stephens: Is this the license agreement which was referred to in the complaint?

Mr. Knuff: Yes, your Honor. We would have offered this agreement before, on the first day of the trial, but we didn't have it at the time, and we didn't have a photostat of it.

Mr. Johnston: May I inquire, Mr. Knuff, if that date is the 11th of April or the 18th? I thought it was the 18th of April.

Mr. Knuff: It says here the 11th.

Mr. Johnston: Look at the signature date. There was something about the date of the signing of that contract—

Mr. Knuff: (Interposing) I will show it to you.

Mr. Johnston: No, that is not necessary, but I know that that has been the testimony all the way through here.

Mr. Knuff: I think that has been the testimony, that it was dated the 18th, but it appears from page 1 of Exhibit 599 for identification that it was dated April 11th, and on the signature page, page 12, I don't see anything that would indicate that it was signed on another date than the 11th.

5589 Justice Stephens: No, it says on page 12, "the day and year first above written," and on the first page the date is shown as April 11th.

Justice Jackson: There is only the one agreement, is there?

Mr. Knuff: As far as I know. Is there more than one, Mr. Johnston?

Mr. Johnston: No, but the fact is that it was not finally signed on that date, and the exchange of letters shows it is of the 18th. It is considered to be a contract as of April 18th.

Justice Jackson: What difference does it make?

Mr. Johnston: I don't think it makes any difference, I was just calling it to Mr. Knuff's attention.

Mr. Bromley: My understanding is that it was re-executed on the 18th of April for some reason, perhaps because of a defect in the original agreement. Is that right, Mr. Johnston?

Mr. Johnston: That may be, I have forgotten.

Mr. Knuff: If the Court thinks it is important, I will see if I can clear it up.

Justice Stephens: If there is some defect in the agreement of April 11th, and it was re-executed to clear up the defect, we ought to see the later agreement, if that is the fact.

Mr. Knuff: I would like to see that too.

5590 Justice Stephens: See if you can clear it up by asking the witness.

By Mr. Knuff:

Q. Mr. Chism, do you have before you Government's Exhibit No. 599 for identification? A. Yes, I do.

Q. And was the contract executed on that date, April 11th, if you know? A. It was first executed on this date, April 11, and as I recall it, it was amended or corrected on April 18th.

Q. Corrected in what respect? A. I couldn't tell you.

Q. Well, does the correction that was made on the 18th appear on the agreement that you have before you? A. No, it doesn't.

Q. Well, where does that correction appear? A. My recollection is that it was contained in correspondence, in letters.

Q. Do you have that correspondence with you? A. I believe it has been turned over to you.

Q. Well, I will show you everything that you have turned over to me, and if you will point out to me just what you have in mind, I will be glad to—

Mr. Johnston: (Interposing) If the Court please, the correspondence that he is handing the witness does

5591 not show that, but all of our correspondence was turned over to the Government in response to the subpoena, and the letter in reference to the correction of a name, or the seal, or something like that, is in possession of the Government, although it is not in this last bunch of documents that the Government asked us to furnish them the other day.

I can turn to that in the photostats.

Justice Stephens: Well, we will take the noon recess at this time, and that will give the Government time to look at its files, and perhaps this may then be cleared up.

(Whereupon a recess was taken at 12:10 o'clock p.m. until 1:45 o'clock p.m.)

(The trial was resumed at 1:45 o'clock p.m., pursuant to recess.)

Justice Stephens: The Court will make rulings on the Exhibits, 233 and 324, which were taken under advisement.

First, the ruling on Certain-teed's motion to strike Exhibit U. S. 324.

5593 Exhibit U.S. 324 is an answer filed by Certain-teed in an action brought against it by USG to restrain Certain-teed from acquiring the assets of Beaver. The exhibit was received in evidence at Tr. 2861-2 as an admission by Certain-teed but not as binding, as a declaration, on other defendants unless connected by other evidence showing the admission to be in furtherance or execution of the alleged conspiracy. At Tr. 3283-5 Mr. Adams for Certain-teed moved to strike Exhibit U.S. 324 upon the ground that it had been ascertained by him upon reading the exhibit that it is not a verified answer and is therefore incompetent. Mr. Adams filed a memorandum in support of his motion wherein he urged this ground (and also that the answer is not signed by Certain-teed (and also that the statements in the answer, Exhibit U.S. 324, are inadmissible because conclusional in nature. The Government filed a memorandum in opposition. Argument was heard and appears in the transcript of February 15, 1944.

The applicable rule of law found in the decisions of Federal courts, including those cited by Mr. Adams in his memorandum, is not a strict rejection of unsigned or unverified pleadings but a rejection of those not connected with the party against which they are offered by oath, signing, adoption, acquiescence, ratification, or circumstances such as allegations of information which could have come only

5594 from the party itself against which the pleading is offered. The use of such pleadings, once they are admitted in evidence, is, as pointed out in 4 Wigmore, Evidence (3d ed. 1940) Par. 1066, limited to the facts they contain; conclusions and other incompetent statements being avoided.

A study of the record leads to the conclusion that there is no direct evidence that Certain-teed furnished the facts alleged in the pleading, Exhibit U.S. 324, to its lawyers or that the lawyers were present at a time when Certain-teed's officers were discussing its dispute with USG. On the other

hand these circumstances do appear: George M. Brown wrote a memorandum while he was president of Certain-teed, which memorandum is in evidence as Exhibit U.S. 212, wherein he stated that Certain-teed must prepare to answer the suit of USG, should appear as a party to it, and should assert that the suit is not filed in the interest of royalties but for the sole purpose of trade domination, monopoly and price control. The allegations of Exhibit U.S. 324 are strikingly similar to this description by Mr. Brown of what should be asserted in the answer to be filed. It appears from Exhibit U.S. 211, a memorandum dated February 7, 1928, which was attributed by the witness C. O. Brown to L. R. Walker, vice president of Certain-teed (Tr. 1930) that the officers of Certain-teed were in communication with Cravath, Henderson and DeGersdorff concerning Certain-teed's acquisition of the Beaver plants, the transaction out of which the dispute with USG arose. The
5595 firm of Cravath, Henderson and DeGersdorff appears on Exhibit U.S. 324 as counsel for Certain-teed. A reading of Exhibit U.S. 324 shows that it contains many allegations of fact relating to the affairs of Certain-teed and the gypsum industry generally. Information about such matters is not usually acquired by counsel in a casual manner but from detailed disclosures made by clients. The fair inference to be drawn from the foregoing circumstances is that the allegations in Exhibit U.S. 324 are attributable to Certain-teed.

The allegations in Exhibit U.S. 324 are not all mere conclusions or statements of law. A reading of paragraphs 27 and 28 of the exhibit, the paragraphs to which the Government mainly refers in its reliance upon the exhibit, reveals that there is a considerable amount of factual material stated. The exhibit can be received for its factual value.

The court reaffirms its prior ruling. The objections of Certain-teed are overruled and its motion to strike is denied. Exhibit U.S. 324 remains in evidence as an admission of Certain-teed, not binding upon the other defendants unless it be shown that the statements in it were made in furtherance or execution of the alleged conspiracy and unless the alleged conspiracy itself be shown aliunde.

Ruling on the Government's reoffer of U.S. 233:
5596 The document marked for identification U.S. 233 is a memorandum dated August 2, 1929, purporting to have been written by A. D. Redfield, patent attorney, to

C. O. Brown of Certain-teed Products Corporation. When it was offered in evidence at tr. 2878, Mr. Adams for Certain-teed objected on the ground that the document came within the attorney-client privilege. Thereupon the Government sought to show by Redfield that the privilege had been waived by Certain-teed through instructions given by a Mr. Dowd when Redfield and an Assistant United States Attorney called Certain-teed's New York office by telephone about June 4, 1940, at the time of the grand jury investigation of the criminal aspects of the alleged violations of the Sherman Antitrust Act. Mr. Adams objected to this use of the telephone conversation because Mr. Dowd was not an officer of Certain-teed at that time, and because the person with whom Redfield said he spoke had not been identified as Mr. Dowd. There was no showing at that time that Mr. Dowd was an officer of Certain-teed or that he otherwise had authority to waive the privilege for Certain-teed. The court ruled at tr. 2890 that the offered exhibit would be refused because privileged, the privilege not having been shown to have been waived by Certain-teed.

At tr. 3529-31 Government counsel requested and obtained leave to reoffer the document on the ground
5597 that it had been ascertained that Dowd had actually been an officer of Certain-teed at the time in question. Mr. Dowd's official position with Certain-teed is now conceded by Mr. Adams.

After careful consideration of the memoranda submitted by both sides and after listening to oral argument, the court has reached these conclusions:

A telephone conversation may be used as the declaration of the purported speaker if that speaker is sufficiently identified. This identification may be made by circumstantial evidence. It is a settled rule in this jurisdiction that it is a prima facie identification of a particular party to a telephone conversation if the call was made to the party's place of business and someone answers and represents himself to be that party. See *Campbell* v. *Willis*, 53 App. D. C. 296, 290 Fed. 271 (1923), and *Takahashi* v. *Hecht Co.*, 62 App. D. C. 72, 64 F. (2d) 710 (1933). Circumstantial identification is even more convincing where the party responding to a telephone call shows knowledge of the subject matter of the call. *Van Riper* v. *United States*, 13 F. (2d) 961 C.C.A. 2, 1926).

The person responding to Redfield in the telephone conversation of June 4, 1940, has been identified circumstan-

tially as Mr. Dowd, in our view. Redfield stated that he and the Assistant United States Attorney had together called Certain-teed's New York office and that he,
5598 Redfield, had spoken with a person representing himself to be Mr. Dowd. As above stated, it is now conceded that Certain-teed had at that time an officer named Dowd. Furthermore, it appears from the statement attributed to this person that he was familiar with the Government investigation and with the past policy of Certain-teed with respect to furnishing documents to the Government. This is a prima facie showing that Dowd was speaking and that, as an officer of Certain-teed, he was speaking for the company.

In response to Redfield's inquiry as to what he should do with respect to claiming or waiving privilege, Mr. Dowd's statement, as reported by Redfield, was: "Well, I don't know, we have nothing to hide, we have thrown our records open to the Department of Justice and so far as I can tell there is no reason that you should not testify." Although mere identification of a document is not a waiver, this authority to testify coupled with the knowledge that the exhibit, if identified, was to be used in evidence before the grand jury would seem to be sufficient to constitute a general waiver. Redfield carried this grant of authority into effect when he went before the grand jury and identified the document so as to lend authority or approval to its use by that body.

Privilege once waived may not be reasserted because the disclosure exhausts the reason for the privilege. Mr. Adams' objection that U. S. 233 is privileged is,
5599 therefore, on the present state of the record, not well taken. Mr. Adams asks leave to call Mr. Dowd to deny the telephone conversation. This leave is granted. That is to say, the testimony for which Mr. Adams proposes to call Mr. Dowd goes to a preliminary question of fact, one not bearing upon the merits of the case as a whole but determining the admissibility of an item of evidence. The defendants are entitled to a ruling before the close of the Government's case as to what evidence is in the record in support of the Government's case. See 9 Wigmore on Evidence (3d ed., 1940) Par. 2550 and cases cited there. The settled practice in this jurisdiction is to determine on voir dire, during the case of the party offering evidence, preliminary questions of fact which themselves determine the admissibility of evidence and to hear, on such voir dire, such evidence as is offered

by either party in respect of the preliminary question of fact. See *McAffee* v. *United States*, 105 Fed. (2d) 21; 70 Appeals, D. C. 142 (1939) in respect of confessions. It will, therefore, be the duty of the court to decide after hearing the witness Dowd whether or not the telephone conversation testified to by Redfield did occur and what its content was in respect of the asserted waiver, and thereupon to determine whether a waiver was authorized.

At tr. 3995-6 Mr. Bromley objected that proposed Exhibit 233 is irrelevant and immaterial because not
5600 shown to be in furtherance or execution of any conspiracy charged in the complaint. The binding effect of the document on Certain-teed is difficult to see since it is not a statement by Certain-teed itself, but by its attorney. There is no present showing that his views were or became the company's views. Even as an admission of Certain-teed the document is not yet shown to be in furtherance or execution of any conspiracy so as to bind the other defendants. These elements may, however, be supplied by later evidence, and the document could be received subject to connection in these two respects.

Mr. Bromley also requested that, if the document is received in evidence, Redfield be recalled for cross examination. Since this document is accredited by Redfield and was written by him, it is but fair and reasonable that the defendants be permitted to cross examine as they have been permitted to cross examine about other exhibits.

In summary, the court rules that a prima facie showing on voir dire has been made of a waiver of privilege in respect of proposed Exhibit 233; so that in the absence of convincing contradictory evidence as to the fact or content of the asserted Redfield-Dowd telephone conversation, the exhibit would be admissible subject to a showing that it is an admission by Certain-teed and subject to the usual reservation. But Certain-teed may call Dowd; and
5601 the court, after hearing his testimony, will rule as to whether the exhibit is admissible. If the exhibit is received, it will be received subject to the recall of Redfield for further cross examination.

Mr. Adams: If the Court please, I was just wondering, with respect to the question of calling Mr. Dowd—since the matter last came before the Court, Mr. Dowd has been again promoted from vice president, and is now president of the company, and it makes it a little more difficult to get hold of him. Do Your Honors have any particular time when you would like to hear that evidence?

Justice Stephens: No, it makes no difference. Any time before the close of the Government's case.

Mr. Adams: Thank you.

Justice Stephens: Mr. Redfield will have to be returned, also.

Justice Jackson suggests that we hear the Dowd testimony first, and if we should then rule that there has been no telephone conversation, or that the contents do not constitute a waiver, then it might not be necessary to recall Redfield.

Where is Redfield?

Mr. Adams: Cincinnati, I believe, Your Honor.

Justice Stephens: We will leave that to the convenience of counsel. This ruling will be copied into the record, and will be clear, I think, from the statement made by
5602 the Court.

Take the witness stand, Mr. Chism.

I may add that we have gone very carefully into these two questions, and extensive memoranda have been prepared and exchanged by the Judges, and the authorities were carefully examined; but it seems not necessary to make a more extensive announcement of the reasons for the rulings than have just been made.

Thereupon, H. E. Chism, the witness on the stand at the time of recess, resumed his testimony as follows:

Mr. Knuff: May it please the Court, apropos of Government's Exhibit 599 for Identification, Mr. Johnston has shown me the correspondence that transpired between the Texas Cement Plaster Company and the United States Gypsum Company, and I believe that the following are the facts:

Originally the contract, Exhibit 599 for Identification, was executed on the 11th day of April, 1927, and it was mailed to the United States Gypsum Company. It so happened, however, that in executing the contract, the Texas Cement Plaster Company—which at that time was a corporation—failed to affix thereto its common and corporate seal, and when the United States Gypsum Company received that contract they called this omission to
5603 the attention of the Texas Cement Plaster Company, sent the contract back to them, and said that while they didn't think it would affect the legality of the contract, nevertheless they felt that the seal probably should be affixed, and they asked the Texas Cement Plaster Company to affix its corporate seal.

The Texas Cement Plaster Company did do this, and they sent the contract back to the United States Gypsum Company, changing the date on it from the 11th to the 18th, but omitting to change the date on their own retained copy, at all.

So that, the United States Gypsum Company's copy was dated the 18th, and the retained copy of the Texas Cement Plaster Company remained as April 11.

Other than the affixing of the corporate seal and the changing of the dates, the contract, Government's Exhibit 599 for Identification, is identical to the contract that was sent to the United States Gypsum Company.

I have, I believe, stated the facts.

Mr. Johnston: And the parties considered the contract as of April 18.

Justice Stephens: Then that may be shown as stipulated between Mr. Johnston and the Government.

Direct Examination (resumed)

By Mr. Knuff:

Q. Do you have before you, Mr. Chism, Govern-
5604 ment's Exhibit 599 for Identification? A. Yes.

Q. I want you to look at that exhibit, following page 12, and you will notice that there is attached immediately following page 12, Exhibit "A"—do you notice that? A. Yes, sir.

Q. Now, in a separate document, consisting of four pages, which I now ask to have marked for Identification as Government's Exhibit 599-A, you will find another exhibit also called Exhibit "A".

(The document referred to was marked as Government's Exhibit No. 599-A for Identification.)

(Government's Exhibit No. 599-A for Identification was handed to the witness.)

By Mr. Knuff:

Q. Will you tell us just what your understanding is of the reasons for having two Exhibits "A"? A. My recollection is that this second Exhibit "A" includes all of those patents on the first one, and in addition there are other patents included.

Q. Government's Exhibit 599-A was always considered a part of the April 1927 contract, is that correct? A. Yes, that is my recollection.

Mr. Knuff: We now offer in evidence Govern-
5605 ment's Exhibits 599 and 599-A.

Justice Stephens: Is there any objection?

Mr. Bromley: May I have a minute, Your Honor?

Justice Stephens: Take your time.

Mr. Knuff: I may say that when these documents were given to us by Mr. Johnston they were in the form presented to the Court—that is, Exhibit 599 had an Exhibit "A" attached; and then there was another Exhibit "A", separate and not attached, which we have now identified as Exhibit 599-A.

Mr. Bromley: May it please the Court, we make only the usual objection to Exhibit 599.

Justice Stephens: It is received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 599, was received in evidence.)

Mr. Bromley: I should like to examine as to the competency of Exhibit 599-A at this time.

Justice Stephens: You may.

By Mr. Bromley:

Q. Will you turn to the third page of Exhibit 599-A, please? A. Yes, sir.

5606 Q. Do you see that in the margin someone has written the words, in pencil or ink, "New"? A. Yes, sir.

Q. Did you do that? A. No, I did not.

Q. Do you know who did? A. I couldn't tell you.

Q. Do you notice that opposite the word "New" at the top of the page, the reference is to Birdsey patent No. 1,643,801? A. Yes, sir, I do.

Q. And do you notice that in the second line of that paragraph, there is the phrase, "filed January 13, 1921, granted September 27, 1927"? A. Is that the first one mentioned on that page 3?

Q. Yes. A. It doesn't show that here.

Q. Have you got Exhibit 599-A? A. Yes, sir.

Q. After the underlined words "Birdsey patent No. 1,643,801.", doesn't this language appear: "Application Serial No. 437,062, filed January 13, 1921, granted September 27, 1927, expires September 27, 1944."? A. That is right.

Q. Now, do you see, Mr. Chism, that the note
5607 "granted September 27, 1927" indicates that that patent was granted after you signed your license agreement? A. Yes, that would be true.

Q. Do you notice that that is true as to every paragraph which is marked "New"—that is to say, that the granting date of the patent is a date later than the date of your license? A. I think that is true, yes.

Q. And do you notice on the last page, opposite the third paragraph, as to which there is contained in the margin the note "New", that the granting date of that patent is given as February 26, 1929? A. That is right.

Q. Now, that would indicate that this document, 599-A, was furnished to you some years after you signed the license agreement, wouldn't it? A. Yes, sir, I think it was.

Q. Now, isn't it a fact, then, and don't you now recall, that all this is is a list of the patents or applications which were contained in Exhibit "A" annexed to your contract, brought down to date so as to show which of the applications had ripened into patents, and the dates on which the patents had been granted under the applications? A. That may be true, I never checked it in that way.

Q. You didn't understand that you were being
5608 given any new rights under this Exhibit 599-A, over what were contained in the original Exhibit "A" to Exhibit 599, did you? A. I never had full charge of this matter at that time. I knew something about it, but not a great deal. So I couldn't tell you.

Q. Well, you know now, at least, that 599-A was not a part of the original contract, but was something furnished to you afterward; is that right? A. Yes, that is right.

Q. And was probably merely a revision of the original Exhibit "A" so as to put in the dates on which the applications contained in the original Exhibit "A" had thereafter been issued as patents; isn't that correct? A. I believe that is correct.

Mr. Bromley: With that showing, we make only the usual objection to Exhibit 599-A.

Mr. Knuff: Before the Court rules on it, I can see no reason why I should put it in at all, so I will withdraw it. It appears that Exhibit 599 is the original contract.

Justice Stephens: It may be withdrawn, if you desire to withdraw it.

(The document marked as Government's Exhibit 599-A was withdrawn.)

By Mr. Knuff:

5609 Q. Mr. Chism, if I understand you correctly, you took no part in the negotiations leading up to the execution of Government's Exhibit 599; is that correct? A. No, I did not.

Q. Mr. Gloyd was the gentleman that did negotiate with the United States Gypsum Company concerning that license agreement? A. That is correct.

Q. And you played no part in it at all? A. No, I didn't.

Q. Now, do you know, Mr. Chism, whether or not any patent studies or any patent surveys had been made by Texas Cement Plaster Company before this contract was executed? A. I am quite sure there was not.

Justice Stephens: I don't understand that question, I am sorry. I think I missed one of your words.

Please read it.

(The question was read by the reporter.)

Justice Stephens: Thank you, I understand now. I missed one word.

By Mr. Knuff:

Q. If there had been any patent studies made, do you feel that you would have known about them? A. Yes, I believe I would.

5610 Q. Will you look at page 3 of Government's Exhibit 599, and look at the last paragraph on page 3, beginning with, "It is expressly agreed and understood"—do you notice that? A. Yes, I do.

Q. You understand by that paragraph, do you, that that is the paragraph that reserves to USG the right to fix and determine the minimum price at which Texas could sell the product; is that correct? A. Yes, I believe that is correct.

Q. Now, following the execution of Government's Exhibit 599 in April, 1927, did USG notify you as to the price or prices at which you could sell gypsum board and gypsum lath? A. Yes, they did.

Q. What form did those notices take, sir? A. I couldn't tell you the exact form. I would say it was their regular price bulletins.

Mr. Knuff: Will you show the witness Government's Exhibit 33, please?

(Government's Exhibit No. 33 was handed to the witness.)

By Mr. Knuff:

Q. The book that you have before you, sir, contains price bulletins issued by the United States Gypsum Company, or some of the price bulletins, I should say,
5611 issued by the United States Gypsum Company after March 21, 1931. Now the notices that you got under the 1927 agreement, were they in the form in which the price bulletins appear in Government's Exhibit 33? A. I couldn't remember definitely that they were, but I would presume so.

Q. When you say you "would presume so", do you mean that that is your best recollection? A. That is my best recollection.

Q. You were asked to produce all the price bulletins that USG sent to you, and I don't believe that you produced any prior to May 23, 1929. Do you recall that? A. I recall that we produced all that we had, but I don't remember the dates.

Q. Well, if you will accept my word for it, the record that we have indicates that no bulletins prior to the 23rd day of May, 1929, were furnished us by Texas Cement Plaster Company. A. If you say that is true, I will accept it.

Q. That is what the records in our office indicate. A. All right.

Q. Do you recall whether or not—

Mr. Johnston: (Interposing) If the Court please, I don't believe that that is the fact. The Government has the list of the bulletins that were furnished, and I
5612 wouldn't want to accept that as the fact. I think that record will speak for itself. That was at the time the records were subpoenaed and furnished for the grand jury investigation.

Mr. Knuff: That is correct.

Mr. Johnston: I think the Government should produce that correspondence, that letter, and that will show what was produced.

Justice Stephens: What is the point? Do you want to prove what bulletins were sent by some other evidence?

Mr. Knuff: The point is this, Your Honor, that when Mr. Chism testified before the Grand Jury, his omission to furnish these bulletins was called to his attention, and I think

at that time he excused it on the grounds that, "You have everything that we have; if you don't have them before May 23, 1929, we don't have them; we have given you everything that we have."

I can say that I have never seen, over in our office, any bulletins prior to May 23, 1929.

Justice Stephens: What is the point of it all? If he hasn't got them and you haven't got them, what are you going to do about it?

Mr. Knuff: I am going to try to find out just exactly what was in those prior bulletins, if he knows.

Mr. Johnston: Now, it would seem to me, if the Court please, instead of showing this witness a volume of
5613 bulletins that he doesn't know anything about, and asking him if those aren't the kind of bulletins he received, it would be much better if you would show him the bulletins that he received and ask him if they were the kind of bulletins that he received otherwise.

Justice Stephens: There is no dispute about the fact, is there, that USG sent him these bulletins?

Mr. Johnston: Not at all.

Justice Stephens: Why couldn't the whole thing be stipulated to, as to what bulletins were sent to him and received by him?

Mr. Bromley: I am willing to stipulate that we sent him bulletins from April 18, 1927, to August 6, 1929.

Justice Stephens: And that the terms of the bulletins were the same as those sent to other licensees, which other bulletins are in evidence? Could that be stipulated to, if that is the fact?

Mr. Bromley: Well, let me see. The bulletins were sent in that interval only to such companies as were licensees.

Justice Stephens: That is right.

Mr. Bromley: I think we can stipulate that they were in substantially the general form as are the later ones which are in evidence, that is, they cover prices and terms and conditions of sale. I don't mean by that that they in-
cluded everything that was in the later bulletins, but
5614 in substance they were the same kind of documents.

Justice Stephens: Now, is there any contention in the case, Mr. Knuff, concerning the exact amount of the prices in these earlier bulletins?

Mr. Knuff: I don't know what those earlier bulletins contained, because I never saw one. We asked the United

States Gypsum Company to furnish us with the price bulletins at the criminal trial, and they were furnished; and the bulletins that were furnished us are the bulletins that are now in evidence. I have never seen a bulletin prior to May 23, 1929. I don't know what it looks like. We don't have any over in our files. I am just trying to find out what was in those bulletins. These bulletins, Government's Exhibit 33 and the series of bulletins following that, were furnished us by the United States Gypsum Company; and at the time they were furnished us, we were told that these were all the bulletins that they had at the time.

Justice Jackson: What is the first date?

Mr. Knuff: The first one in here is March 21, 1931. Now there is a period of approximately four years that I know nothing about, I don't know the form that the bulletin took, what was in it, or anything else.

Mr. Johnston: I think counsel is in error there. I think he has one here of August 3, 1929.

Mr. Knuff: I am referring to the bulletins I have
5615 in front of me in Government's Exhibit 33, the first of which is March 23, 1931. I have seen them from May 23, 1929, but I have never seen a bulletin prior to May 23.

Mr. Bromley: Counsel knows now,—I have just stipulated the fact,—back to 1927.

Mr. Knuff: But the stipulation, while I am grateful for the stipulation, it still doesn't help me as to what was in the bulletins.

Justice Stephens: Who can help you, Mr. Knuff?

Mr. Knuff: The witness, maybe.

Justice Stephens: Go ahead and examine him, then.

By Mr. Knuff:

Q. Do you recall what was in the first bulletins that you received, sir? A. No, sir, I couldn't tell you.

Q. Can you tell us whether or not, in addition to specifying the price, there was anything in those bulletins concerning the arbitrary shipping weight that a thousand feet of board should have? A. I couldn't tell you.

Q. Could you tell us whether or not there was a so-called truck delivery area specified in those earlier bulletins? A. I couldn't tell you for certain. I don't think there was.

5616 Q. Could you tell us whether or not there was anything in those earlier bulletins concerning the regulation of stopover charges? A. No, sir.

Q. When you say "No, sir", do you mean that you can't tell, or there wasn't anything in them? A. I mean I don't remember what was in those. If I saw one, I could probably tell you.

Q. I am sorry I can't give you one to look at. I would like to.

Mr. Knuff: I wonder if the United States Gypsum Company could help us out as to those earlier bulletins?

Mr. Bromley: We have furnished everything to the Government that we had at the time we furnished them, and we have nothing else.

Mr. Knuff: While I appreciate Mr. Bromley's offer to stipulate, in view of the fact that I have never seen a bulletin issued prior to the 23rd of May, 1929, I am afraid I can't agree to that stipulation.

Justice Garrett: What are you going to do about it?

Mr. Knuff: I don't know what I am going to do about it. I thought I could get it from this witness, but apparently the witness is just as—and I am not criticizing the witness, I want the Court to understand that—

Justice Stephens: (Interposing) You had better
5617 proceed to another topic, then, and see if you can find these bulletins outside of Court.

By Mr. Knuff:

Q. Well, you do know, Mr. Chism, that you did receive some notification from the United States Gypsum Company concerning the price at which gypsum board and lath was to be sold; is that correct? A. Yes, we received notice.

Q. And the Texas Cement Plaster Company, from 1927, sold at those prices; is that right? A. Yes, we did.

Q. And— A. (Interposing) Up to August 6, 1929.

Q. To August 6, 1929? A. Yes.

Q. Now, after August 6, 1929, did Texas Cement Plaster Company receive a notification from United States Gypsum Company to disregard any previous prices that had bee sent you?

Mr. Bromley: I object to that as immaterial. I think that assumes that such a notice was necessary; whereas, it is apparent, from reading the bulletins that he received, that no such notice was necessary, because the prices were

only fixed under the patent which expired on August 6, 1929.

5618 Justice Stephens: What do you contend as to the materiality of that; since the bulletins fixed the prices only up to a given date, what would it prove for the Government that no notice was given of a discontinuance of prices after that?

Mr. Knuff: I want to know just exactly what USG did. After the so-called Hite and Haggerty patents expired on July 8, 1941, USG sent out a notice under those patents. Now I want to know what they did under the original patents, under the original license agreements.

Mr. Bromley: That argument is neither so nor sound. In 1941, when we sent out a letter, we had patents in force and effect under which we might have fixed prices. We chose no longer to exercise the right, and sent out a letter that we were not going to fix prices any more, at that time. We just chose to discontinue the fixing of prices then.

Back in 1929, the patent under which we had a right to fix prices, expired.

Justice Stephens: We don't see any materiality in it, Mr. Knuff. It is without dispute in the case that the bulletins fixed prices only up to a certain date. If that is the fact, the absence of notice after that wouldn't prove anything one way or the other.

Mr. Knuff: May it be stipulated that no notice was sent out, Mr. Bromley?

5619 Mr. Bromley: I object to that as immaterial.

Justice Stephens: The stipulation would be as immaterial as the proof. The objection is sustained.

By Mr. Knuff:

Q. During the period after April, 1927, and before August 6, 1929, did you purchase board, did Texas purchase board and lath from any other manufacturer? A. I don't remember. I don't believe we did.

Q. In 1927, what companies were selling board and lath in the territory in which the Texas Cement Plaster Company sold board and lath? A. Well, in the principal part of our territory, it would be the United States Gypsum Company, the Certain-teed Products, the Universal Lime & Cement Company, and the Texas Cement Plaster.

Q. Was National down there? A. National was not down there at that time.

Q. Now, after August 6, 1929, at what prices did you sell board and lath in the territory covered by Texas? A. I wouldn't remember. We sold it at the best price we could get for our goods.

Q. Do you mean by that that you sold it at the prevailing price? A. Yes, we did.

Q. You knew that at that time all companies, ex-
5620 cept yourself, had taken out a license with USG, and that under the terms of that license USG fixed the price of the board and lath? A. I probably knew that some of them were operating that way, but not all of them.

Q. Well, it is a fact, and it has been testified in this case —and I believe that you can accept this as correct—that from the middle of 1930, all the companies named as defendants in this case, with the exception of Texas, were licensees of USG—

Mr. Oliver: (Interposing) Of course, that isn't correct.

Mr. Knuff: Just a second, please, Mr. Oliver.

Justice Stephens: Finish your statement; and then don't answer, Mr. Chism, until Mr. Oliver objects.

Mr. Knuff: (Continuing) —with the exception of Texas and Celotex, were licensees of USG, and it is also a fact that under these license agreements USG fixed the price of the licensees.

Now will you tell us whether your sales were at the same prices that the other companies charged, in the territory that you operated in?

Mr. Bromley: I object to that question as assuming facts not in evidence, and also as incompetent because calling for a conclusion, and not the proper way to prove
5621 the prices.

Mr. Knuff: I am not trying to prove a specific price. I am trying to prove a policy.

Justice Stephens: Ask him for the policy, then.

The objection is sustained.

By Mr. Knuff:

Q. Was it the policy of your company to sell at the prices that other companies sold at? A. No, sir.

Q. What was the policy of your company? A. It was to follow the prevailing prices in the field.

Q. And the— A. (Interposing) The prevailing market price.

Q. And the prevailing prices in the field were prices that were fixed by USG?

Mr. Bromley: I object to that—

The Witness: (Interposing) I couldn't say that.

By Mr. Knuff:

Q. From time to time, Mr. Chism, your salesmen would report to you the prevailing prices in the territory that they covered, would they not? A. Yes, they would, quite often.

5622 Q. And from time to time your dealers would report to you the prices at which your dealers were offered gypsum board and lath by other companies, would they not? A. Very often.

Q. And you tried to keep advised as to the prevailing prices, did you not? A. We did try at all times.

Q. And was the policy of your company to sell at the prevailing prices? A. Yes, sir.

Q. In 1928, Mr. Chism, would you say that the price of board had declined from what it was in 1926? A. Well, my recollection is that it had declined, yes.

Q. Would you say that during 1928 there was what is known, or what was known throughout your territory, as a price war? A. Some called it that, yes, sir. There was quite a disturbance.

Q. Pardon me? A. There was quite a disturbance in prices.

Q. What do you mean by "quite a disturbance in prices"? A. Prices were demoralized, and down, and going down.

Q. And how long did they continue to go down? A. Oh, I would say a year, maybe a little longer.

Q. Would you say that the prices became firm
5623 around about June, 1929? A. No sir, I wouldn't say that.

Q. When would you say that they did become firm? A. They didn't become firm until possibly 1932 or 1933—that would be my best judgment.

Q. You are talking about the price of board, are you? I am only confining my questions to the price of board. A. Yes, that would apply to board.

Q. Do you mean that the prices of USG and Certain-teed and National, which were reported to you, showed a variance at any particular time—and I am still referring to board and only board?

Mr. Johnston: If he knows as to their prices?

Mr. Knuff: Yes.

The Witness: I don't think I would know definitely about that. As a matter of fact, the National was not operating in that territory.

By Mr. Knuff:

Q. Well, Certain-teed and Universal and USG? A. I couldn't tell you what their prices were.

Q. Well, without telling me in dollars and cents, were all the prices the same, or was one higher or lower than the others? A. I don't know.

Q. Do you know, Mr. Chism, whether or not the
5624 Texas Cement Plaster Company, after April 11, 1927, and down to August 6, 1929, ever received any notices about meetings of licensees? A. I think we may have received one or two or three letters, or something of that sort.

Q. And is it a fact that someone from Texas attended one or more of those licensee meetings? A. As far as my knowledge goes, nobody ever did.

Q. No person from Texas ever attended any of those licensee meetings? A. No, sir.

Q. Although Texas received notice, no one attended? A. That is right.

Q. Did you have a man working for you down there at that time by the name of Mr. Jacobs? A. Yes, sir.

Q. Did Mr. Jacobs ever attend any of those meetings? A. So far as my knowledge goes, he did not.

Mr. Knuff: I didn't think there would be any question about this, your Honor.

By Mr. Knuff:

Q. I show you, Mr. Chism, what has been marked for identification as Government's Exhibit 600, the same being a letter, dated June 24, 1929, addressed to John E. MacLeish, attorney, and signed S. M. Gloyd; attached to which
5625 letter, and mentioned in Government's Exhibit 600 for identification, is what has been marked Government's Exhibit 600-A for identification, the same being a telegram dated June 24, 1929, addressed to Mr. John E. MacLeish and purporting to be signed by S. M. Gloyd, President, Texas Cement Plaster Company.

(The documents referred to were marked Government's Exhibits Nos. 600 and 600-A for identification.)

(Government's Exhibits Nos. 600 and 600-A for identification were handed to the witness.)

By Mr. Knuff:

Q. Will you look at Government's Exhibit No. 600 for

identification, please, and tell me whether or not that is Mr. Gloyd's signature? A. Yes, that is Mr. Gloyd's signature.

Q. Does that in any way refresh your recollection as to whether or not Mr. Jacobs attended any meeting? A. No sir, it doesn't.

Q. Will you look at Government's Exhibit No. 600-A, and tell us whether or not the telegram form there is the form that was used by the Texas Cement Plaster Company? A. Yes sir.

Mr. Knuff: I offer in evidence, if your Honor pleases, Government's Exhibits Nos. 600 and 600-A.

Justice Jackson: Did you ask him if that refresh-
5626 ed his recollection?

Mr. Knuff: I asked him that and he said it didn't. I am now offering these in evidence, your Honor.

Mr. Bromley: I object to them as immaterial.

Justice Stephens: Do you mean, Mr. Bromley, that you object to these exhibits as immaterial on the ground that it is immaterial whether Mr. Jacobs attended or not, or on the ground that they do not tend to prove that he did attend such a meeting?

Mr. Bromley: On the latter ground, that they do not tend to prove that he attended any meeting.

Justice Stephens: What do you say to that, Mr. Knuff? Here is a telegram stating that Mr. Jacobs would attend. Do you think that that is evidence that he did attend?

Mr. Knuff: I think that that comes very close to the Hillmon case, where the man said he was going up to the mountain.

Justice Stephens: That is exactly what I had in mind. It seems to me that it is doubtful whether it comes within the Hillmon case, but maybe I am wrong. I thought the Hillmon case had to do with a situation where the evidence was of a statement by Hillmon as to where he was going, isn't that true?

Mr. Knuff: Yes, I believe that is true.

Justice Stephens: This is a statement by Gloyd
5627 as to where "Hillmon" was going.

Mr. Knuff: As I say, I am not going to take up the time of the Court, if the Court wants to let it in, all right, or if it wants to exclude it all right. I think it is material or I wouldn't have offered it.

Justice Stephens: The objection is sustained. We think that these documents are not material.

By Mr. Knuff:

Q. I believe, Mr. Chism, that your company never made metallized board, is that correct? A. No, we never did.

Q. And by "metallized board", I mean a board having a foil surface on either one or two sides—you understand that? A. I understand what you mean, I believe.

Q. Your source of supply, if I understand correctly, was the National Gypsum Company, is that correct? A. Principally.

Q. And did you get any from any other place? A. We may have bought some through dealers at Sweetwater, Texas, where the United States Gypsum mill is located.

Q. When you bought the metallized board from National, you either bought National's board that was completely metallized, or you took down to the National's mill your own board and had National put their metal surface
5628 on it, is that correct? A. Yes, we did that.

Q. Your company never signed the metallized license agreement, is that correct? A. No, we never did.

Q. Now, during the time that your company purchased this board, your company received from the USG Company metallized lath or metallized board bulletins, did they not? A. No sir, I don't think so.

Q. You don't think so? A. No sir.

Q. Your company did sign a contract under the Hite and Haggerty Patents on February 10th, 1937, did they not? A. Yes sir, we did.

Q. And after you signed that contract, didn't your company receive from USG the metallized board bulletins? A. No sir, I don't think so.

Q. You don't think so? A. No sir.

Q. And didn't you have correspondence with USG concerning the meaning of the bulletins that were sent you? A. Not the bulletins, I think I had some correspondence relative to one bulletin.

Q. What bulletin was that? A. I couldn't tell you now.

5629 Q. And didn't you have an arrangement with USG that you would sell metallized board in accordance with the terms of USG's bulletins? A. No sir, we had no such arrangement.

Q. You know Mr. Grant Kelleher, don't you? A. I have met the gentleman, yes.

Q. Did you ever tell Mr. Grant Kelleher that you had an arrangement with USG to sell metallized board at bulletin prices? A. I don't think I told him anything like that.

Q. If you had told him about it would you have known it? A. I believe I would.

Q. Would you say now that you did or you didn't? A. That I did not, that is my recollection.

Q. You are positive of that? A. Yes sir.

Q. Did you sell at the same prices that USG specified in their bulletins?

Mr. Bromley: I object to that as incompetent, as calling for a conclusion, and not the proper way to prove prices.

Justice Stephens: Will you read the question again, Mr. Grover?

(The reporter read the question as above recorded.)

Justice Stephens: The objection is sustained. We have sustained many objections to that form of question.
5630 If you want to prove the prices, you will have to prove them in a competent manner. You may ask what the policy was.

Mr. Lapey: May the record show objection on behalf of National as to this testimony of Mr. Chism's, relating to metallized board and lath. I realize that that point has been passed upon, but I think the record should show that objection.

Justice Stephens: You are simply making the objection for the purpose of preserving National's record in respect to this witness?

Mr. Lapey: That is correct, sir.

Justice Stephens: The objection is noted and is overruled.

By Mr. Knuff:

Q. You testified before the grand jury in the District of Columbia on May 3, 1940, did you not? A. On approximately that date, yes sir.

Q. I wish that you would look at your testimony beginning at page 1408, where I have indicated with a pencil mark and continuing down to page 1409, where I have indicated with a pencil mark, please.

Mr. Bromley: May we see it first, if the Court pleases?

Justice Stephens: Yes, you may, and then the Court will look at it.

(The document referred to was handed to defendants' counsel for examination, and following that it was
5631 handed to the Court for examination.)

Justice Stephens: Now show it to the witness, Mr. Marshal.

(The grand jury minutes were handed to the witness, but were not examined by him.)

Mr. Johnston: If the Court please, before the witness looks at those grand jury minutes, or that part of the minutes which has been indicated, I want to make a request that we be permitted to see the grand jury minutes dealing with that entire subject, that is of this witness, so that we may see what his story was before the grand jury. I think it is an improper use of grand jury minutes here, and should not be permitted, in the first place, but if it is, then we should not be limited to three or four questions and answers, which have been singled out by the Government, but we should be permitted to read enough of the minutes so that we may get the context.

Justice Jackson: This is being used to refresh recollection?

Mr. Knuff: In the first instance it is—

Mr. Johnston: But it is not fair to the witness to single out four or five questions, and have him refresh his recollection from that, without seeing the whole story.

Mr. Knuff: I think the whole story on metallized board occupies less than four pages, and if you will hand the minutes back to me, I will mark that portion, as I under-
5632 stand it, and I will hand it up to the Court, and see whether or not that is correct.

Justice Stephens: We think it is fair that the witness should see all of it. Mark it out, and then submit it to defendants' counsel and to the Court again, and then let the witness see it.

I might state, gentlemen, that unless it will inconvenience anyone, there will be no afternoon recess, but the Court will adjourn at 3:30. There is a conference of the judges of the Court of Appeals this afternoon, which I have to attend.

Mr. Knuff: If your Honor please, I want to pass up now for your Honor's inspection, the grand jury minutes beginning at the top of page 1406 and ending where I have drawn a line on page 1408. It is my recollection that that is the entire grand jury testimony of this witness in connection

with metallized board, at this particular time. Whether he testified at any other time or not, I don't know.

Justice Stephens: Hand it to defendants' counsel first.

(The grand jury minutes were handed to defendants' counsel for inspection and were thereafter handed to the Court for inspection.)

Justice Stephens: Show it all to the witness now.

(The grand jury minutes were handed to the witness for examination.)

Mr. Knuff: It starts at the top of page 1406, fol-
5633 lowing: "By Mr. Haddock."

Justice Stephens: And read right down to the point indicated on page 1408—isn't that right, Mr. Knuff?

Mr. Knuff: That is correct, your Honor.

Justice Stephens: And take your time, Mr. Chism.

Mr. Knuff: Now that Mr. Chism has finished, may I have the grand jury minutes, Mr. Marshal?

(The grand jury minutes were handed to Mr. Knuff.)

By Mr. Knuff:

Q. Is it a fact that you did tell Mr. Kelleher that you did have an arrangement with USG concerning the price at which you would sell metallized board?

Mr. Johnston: Just a minute. Now if the Court please, in view of the fact that these other pages that were disclosed to us, put an entirely different light and explanation on the testimony of this witness before the grand jury than those pages that were previously shown, I now object to the use of or reference to these grand jury minutes unless and until I am privileged to see all of the testimony of this witness before the grand jury, for the reason—and I am speaking legally now, I have no personal reference to counsel—I have only counsel's word that these few pages are the pages that have any reference to or any bearing on this subject.

Coming back to my original objection, I think the whole thing is an improper use of grand jury minutes, but
5634 at least I am entitled to look at the minutes and satisfy myself, and not take counsel's word as to whether or not there is any other testimony of this witness in there, and so is the witness entitled to see his testimony.

Now it is just 20 minutes from closing time this evening, and the minutes are not long, and it is not going to hurt anybody and will facilitate the trial and speed up things

here, if that permission is granted, and I make that request and object to the use of or reference to these minutes in any manner until I see them.

Justice Stephens: Is there any objection to that, Mr. Knuff?

Mr. Knuff: Yes, I have an objection to it for this reason, your Honor.

In the first place I think it would create a very bad precedent as far as the Department of Justice is concerned. I don't think that the legal position that Mr. Johnston takes is well taken.

The leading case, or one of the leading cases on this subject, is the Madison Oil Case. In the Madison Oil case—

Justice Stephens: You needn't argue to the Court the propriety of using grand jury minutes for purposes of refreshing recollection. We have already ruled in your favor on that.

Mr. Knuff: I am not going to argue as to the
5635 propriety of their use, but I am going to say that the practice that was adopted in the Madison Oil case, and which the Supreme Court of the United States followed, was for the Court to examine the grand jury minutes to see whether counsel was making an improper use of the grand jury minutes, or not, and that the Court could then say whether or not counsel was making an improper use of them.

The grand jury minutes are, in and of themselves, confidential or secret—

Mr. Johnston: (Interposing) They are not, that is the trouble.

Mr. Knuff: They can be used to refresh the witness' recollection. But Mr. Johnston is not entitled, under any ruling that I know of, ever made by any court of competent jurisdiction, to look at the entire testimony of this witness, the entire grand jury testimony of this witness, to see whether or not the matters that are used here to refresh his recollection are the whole of his testimony.

I think that is the duty of the Court.

Justice Stephens: I thought that the theory of the rule was that once the grand jury's proceeding is terminated by indictment or trial, or what-not, that the rule of secrecy had been dispensed with, so that unless there was something of a defamatory character, or something of that sort in them, which might in the discretion of the Court be kept secret, they could be looked at properly.

5636 I thought we had ruled, Mr. Knuff, that both counsel and the Court must look at the minutes. If the

Court alone looks at the minutes or the record of the grand jury investigation, then counsel for the opposite party must, without opportunity to argue to the Court, or to make objections, accept the Court's ruling, and that is a most unusual procedure. I don't see, myself, offhand, any unfairness at all in letting Mr. Johnston examine the testimony of this witness.

Mr. Knuff: That was the exact question that was raised in the Madison Oil case. They wanted the right to inspect the entire grand jury testimony of the witness who was being interrogated, as to whether or not he said so-and-so, before the grand jury, and the Court in that case ruled that they were not entitled to inspect the entire grand jury testimony of the witness.

Justice Stephens: Is that in the Supreme Court's ruling?

Mr. Knuff: Yes.

The practice in the Madison Oil case was this: The attorney for the Government would say, "Did you testify so-and-so before the grand jury?"

The witness then answered whether he did or whether he didn't.

Counsel wanted the opportunity to examine the entire grand jury minutes. The Government objected to
5637 that procedure on the ground that they were not entitled to do that, and that the most that they could ask would be for the Court to inspect the grand jury minutes to see whether or not counsel for the Government was making an improper use of them.

I haven't any objection to the Court here inspecting the grand jury minutes to see whether I am making any improper use of them. But Mr. Johnston, under the Socony-Vacuum case, is definitely not entitled to look at the entire testimony of this witness before the grand jury.

Justice Jackson: How are you using those minutes now; for what purpose are you having the witness look at them?

Mr. Knuff: To see if they refresh his recollection.

Justice Jackson: Why don't you ask him that? You don't object to such a question as that, do you, Mr. Johnston?

Mr. Johnston: I want him to see all of his testimony, or at least I want to see it first.

I would like to answer that argument of Mr. Knuff. That Madison Oil case was a criminal case—

Justice Stephens: (Interposing) We will hear you, Mr. Johnston, but before you go on, Judge Jackson raises the proposition that perhaps we are wasting a lot of time here, as we have in many other situations in this case, where we have debated on whether or not a witness could answer, and it later turned out that he didn't know anything about the matter. Perhaps this witness' answer, if he were asked if it does refresh his recollection, would be in the
5638 negative. If so, what would be the use in going further with this matter?

Mr. Johnston: Well, I don't know whether what they have shown him does or does not refresh his recollection.

Justice Jackson: Of course you don't, and we don't either, until he answers that question.

Justice Stephens: You have looked over these minutes that have been submitted to you thus far, haven't you?

The Witness: Yes.

Justice Stephens: Do they or do they not—answer this yes or no—refresh your recollection as to what Mr. Knuff—

Mr. Knuff: (Interposing) Pardon me, your Honor, but I just want to say one thing. When Judge Jackson asked me that question I said that that was going to be used first—

Justice Jackson: (Interposing) Let first things come first and second things come second.

Mr. Knuff: I just didn't want to be placed—

Justice Jackson: (Interposing) I understand what you mean.

Justice Stephens: You asked this witness the question as to whether or not it refreshed his recollection—on what? I have forgotten what it was all about.

By Mr. Knuff:

Q. Have you looked at the grand jury minutes that I have shown you? A. Yes.

5639 Q. Do they refresh your recollection as to whether or not you told Mr. Kelleher that you had an arrangement with the USG concerning the price at which you should sell metallized board?

Justice Stephens: Answer that yes or no. Do they or do they not refresh your recollection on that subject?

The Witness: They do not.

Justice Stephens: Now what else do you want to use them for?

Mr. Knuff: The witness has said that he didn't have any understanding with United States Gypsum Company concerning the price at which metallized board was to be sold.

I want to now use the grand jury minutes to impeach that testimony.

Justice Stephens: What is the citation of the Socony-Vacuum case in the Supreme Court?

Mr. Knuff: I am sorry, but I don't have it with me. I can get it for you, shortly.

Mr. Bromley: It is 310 U. S.

Justice Stephens: Mr. Cantor, will you get 310 U. S. for me, so that we may look at it.

How much of the grand jury record is covered by the testimony of this witness? Do you know, Mr. Johnston? probably you don't.

Mr. Johnston: I have never seen that testimony.

5640 I just saw those two or three pages.

Mr. Steffen: It starts, as I have it here, at page 1399, and runs to 1436.

Mr. Johnston: You see the defendants are at a very great disadvantage in a case like this. The criminal case is closed, and the grand jury minutes are supposed to be sealed, if that is their idea, and yet, as to one side of this case they are not sealed. They have every access to them, and we have no access to them, and I just cannot understand that.

Then they come in here with these witnesses, and particularly with this witness, and pick out a page or two, and they have the advantage of knowing the entire testimony, and we are put in the position of only looking at two or three pages.

I think the Court should rule that I have the privilege of looking at those minutes over the recess this evening.

Justice Stephens: It seems, offhand, very unfair to me, but if there is a ruling in the Supreme Court that fixes it, we will have to follow the law. I don't see, myself, offhand, Mr. Knuff, how Mr. Johnston's rights could be protected for his client by merely having the Court examine all of the grand jury minutes showing the testimony of this witness, and then having the Court conclude that the witness ought or ought not to see more than he has been shown, because the Court, conceivably, might conclude otherwise if Mr. Johnston had a right to look at these minutes and make an argument on the subject.

5641 The theory of fair trial is that both sides should be heard, and it does seem unfair to me that the Government is the only one that is allowed to look at these minutes in full; but if there is something in that case, the Socony-Vac-

num case, that compels it, of course we are here to apply the law no matter where the chips may fall.

Mr. Johnston: If the Court please, I want this thing kept in mind in considering that case, and that is, that that Madison Oil case is not an analogous case to our situation here at all.

The Madison Oil case was a criminal case. That was the matter involved; that was the matter before the grand jury then. In this case it is entirely different. We were not a party to the criminal case at all; we were not indicted.

Even if there was some reason in the Socony-Vacuum case why counsel should not be permitted to see the minutes, it would not be any argument that we should be denied that right in this case, it being an entirely different situation.

(The volume requested, 310 U. S., was handed to the Court.)

Mr. Knuff: Page 231, your Honor, I believe is where it starts.

Justice Stephens: The Court has now read that portion of the Socony-Vacuum case, 310 U. S. 150, especially from pages 231 to 234, and it, in the view of the Court, does not bear out your contention, Mr. Knuff.

5642

Mr. Knuff: Before you make a final ruling, I don't want to interrupt you, but I would like to make a statement.

Justice Stephens: We don't want to be unfair to Mr. Johnston. On the other hand, we don't want to allow any fishing expedition into the grand jury minutes, and it is my recollection now—I may be wrong—but it is my recollection now that pages 1406 to 1408 are the only pages in the grand jury testimony that relate to metallized board, or rather to the testimony by this witness regarding metallized board.

Justice Jackson: What fishing could he do if he just looked at the testimony that was given by this single witness?

Mr. Knuff: We are under a very strict rule, over in the Department, not to allow the entire testimony before the grand jury to be disclosed. I want to comply with your Honor's ruling, and I do not want to be adjudged in contempt of court, but please don't put me in a position where I am disobeying the rule, as I consider it, of the Assistant Attorney General. Before the Court makes this ruling, allow me to take this up with Mr. Berge, as I can't turn these minutes over without getting the permission of Mr. Berge.

I have never known of a case where the grand jury min-

utes have been allowed to be inspected. I have known where they have tried repeatedly to obtain that right, but
5643 I can say, in all sincerity, that I know of no case, not a single one, where the defendants have ever been allowed to inspect the minutes of a grand jury, the entire minutes of a grand jury.

Justice Stephens: Now, Mr. Knuff, that case that you called to our attention holds, first, that the grand jury minutes were used merely for the purpose of refreshing recollection and nothing else. It holds that under those circumstances it was not prejudicial error to refuse to submit the minutes to the inspection of opposing counsel. But it clearly rules that the use of grand jury minutes is within the discretion of the trial judge, and that once the function of the grand jury has been discharged, the grand jury minutes can be used in court within the discretion of the judge.

Now the rule of an Assistant Attorney General with respect to the intra-departmental use of minutes of a grand jury, doesn't supervene the rule of a United States District Court.

Our ruling is that those minutes may be shown, so far as the testimony of this witness is concerned, to Mr. Johnston.

We think the case supports that, rather than holds to the contrary.

Justice Garrett: If you wish to confer—

Justice Stephens: (Interposing) Of course if you want to confer with Mr. Berge and have him appear here, you may do so and have him here tomorrow morning.

5644 Mr. Knuff: We don't want to have Mr. Berge appear here, but I wanted to acquaint Mr. Berge with the facts of the case.

Justice Garrett: I suggest that you might do that by withdrawing the question for the time being.

Mr. Knuff: I will do that, then. I will withdraw the pending question.

Justice Stephens: Very well. Of course that means that we will be delayed again tomorrow, because if you ask this question again, and the minutes have to be read at that time, there are 45 or 50 pages of testimony that will have to be read by the defendants' counsel and by the Court.

There can't be any question but what the District Court has discretion under the case which you cite. The Supreme Court of the United States says that it is within the discretion of the trial court. If that is true, your internal rules in

the Department of Justice cannot supervene the ruling of the Court.

If you want to withdraw the question, all right.

Mr. Knuff: I will withdraw the question, your Honor.

Justice Stephens: Very well.

Announce the recess.

(Whereupon a recess was taken at 3:30 o'clock p. m. until 10:00 o'clock a. m. of the following day.)

5645 IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA,

Plaintiff,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS,

Defendants.

Seventh Floor,
Internal Revenue Building,
Washington, D. C.,
Wednesday, March 29, 1944.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

APPEARANCES:

(Same as heretofore noted.)

5650 You may take the stand, Mr. Spencer.

Thereupon, H. DORSEY SPENCER called as a witness for and on behalf of the United States, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Steffen:

Q. Will you state your full name, Mr. Spencer? A. H. Dorsey Spencer.

5651 Q. And where are you located? A. 420 Lexington Avenue, New York.

Q. Are you a member of the patent bar? A. Yes. I am also a member of the bar of Massachusetts, the bar of the State of New York, the Supreme Court, and various District bars.

Q. For how long have you been practicing? A. In general patent practice for 29 years. Before that I was with the Patent Department of the United Shoe Machinery Company for several years.

Q. Were you at one time a member of the firm of Newell & Spencer & Safford? A. Yes.

Q. I now show you what has been marked as Government's Exhibit 601 for Identification; also, what has been marked as Government's Exhibit 602 for Identification—the first being a letter purporting to have been sent by you, Mr. Spencer, under date of March 4, 1936, and addressed to Certain-teed Products Corp.; and Exhibit 602 being a letter addressed to Mr. S. C. Straub of the Certain-teed Products Corp., under date of December 27, 1933.

(The documents referred to were marked as Government's Exhibits Nos. 601 and 602 for Identification.)

(Government's Exhibits Nos. 601 and 602 for Identification were handed to the witness.)

5652 By Mr. Steffen:

Q. Can you identify Government's Exhibit 601 as being your letter? A. Yes, it is signed by me.

Q. And can you identify Government's Exhibit 602? A. Yes. Both appear to be the original letters as signed by me.

Mr. Steffen: We offer Government's Exhibits Nos. 601 and 602, Your Honor.

Justice Stephens: Have counsel had an opportunity to inspect them?

Mr. Steffen: Yes, they have had photostatic copies.

I might say, by way of identification, that the letters have been identified, and they were received from the Certain-teed Products Corportion's files. They bear the Item Nos. A-e-19 and A-e-61.

Mr. Adams: There is no question about that.

Mr. Steffen: The only question which I think might be raised is as to the attorney-client privilege, and this was passed upon by the Court in connection with Exhibit 269 some time ago, when the same question arose. That exhibit was admitted at page 2309 of the transcript, over Mr. Adams' objection raising the attorney-client privilege claim.

I might say further that the present letters are a little more in point, particularly the letter of 1936,
5653 inasmuch as it states many of the things that appear in the Certain-teed's answer to the Government's complaint, paragraph 119.

Justice Stephens: You say page 2309 of the record?

Mr. Steffen: At page 2309 of the record, it was admitted.

Justice Stephens: Let the Court read them.

(Government's Exhibits Nos. 601 and 602 for Identification examined by the Court.)

Justice Stephens: Is there objection?

Mr. Adams: Yes, if Your Honor please, I think I should ask for permission to ask just one or two questions of Mr. Spencer.

Justice Stephens: You may.

By Mr. Adams:

Q. Mr. Spencer, with respect to these two letters, Exhibits 601 and 602 for Identification, at which you have just looked, at the times that you wrote those letters you were, in your capacity as a lawyer, advising Certain-teed; is that correct? A. Yes.

Mr. Adams: Now, I object to the introduction of these in evidence on the ground that they are within the privilege existing between attorney and client. It has been testified that they were written while Mr. Spencer was act-
5654 ing as counsel; they show on their face that they contain legal advice; and it is our position that

they, therefore, are within the privilege, and we assert that the privilege has not been waived up to this time by any act of the defendant Certain-teed.

Justice Stephens: Do you raise any point different from what you raised in respect of the other similar exhibit, Exhibit No. 269?

Mr. Adams: No, I do not, Your Honor.

We had a point there under the answer to paragraph 119—

Justice Stephens: (Interposing) We have it all in mind. I would be glad to hear you further, but we have it all in mind.

Mr. Adams: All right.

(The Justices conferred.)

Justice Stephens: The exhibits are admitted in evidence, consistently with the previous ruling, and for the reasons stated in respect of the ruling, in respect of Exhibit 269.

Mr. Finck: If the Court please, may the record show an objection on behalf of Baker and National, on the ground that these are incompetent, irrelevant and immaterial, and have no bearing on the issues as regards Baker and National in this case. They only relate to perforated lath, and of course, National, we contend—

5655 Justice Stephens: (Interposing) The majority of the Court, I believe, overruled a similar objection at the time of the reserved ruling.

Mr. Finck: That is true.

Justice Stephens: Your objection may be noted, but it is overruled.

Mr. Bromley: I thought the Court was only passing on the issues of competency, and therefore I did not earlier make my objection, which I do now. I object to both exhibits on the ground that they are immaterial and irrelevant, if they are offered as bearing upon the issues of the invalidity of the patent in question.

Mr. Steffen: While they are not offered for purposes of proving invalidity of the patents, I thought Your Honors' ruling covered that very thoroughly.

Justice Stephens: Yes, they are not being received to prove that the patents were invalid, but under the charge of lack of bona fides in the use of the patents as a basis for license agreements.

Mr. Bromley: I object to them further on the ground that they are immaterial and irrelevant because not in

furtherance of any conspiracy, and not binding on any of the defendants other than Certain-teed.

I do not understand the theory of the Government when they offer this piece of evidence as to Certain-teed,
5656 a fact which, incidentally, is admitted in the answer, and I think they will admit that they have no evidence that USG ever had any advice that the patents were invalid. Its position was that they were valid, and they were going to enforce them. So unless the Government is prepared to state that they have further evidence to show the state of mind of the licensor, it seems to me that this evidence, by itself, has no materiality at all to the charge of subterfuge which, as I understand it, is the only theory on which it is offered.

Mr. Steffen: We say as to that, Your Honor, that proof of state of mind, or of the understanding of any one of the parties who have gotten together on the basis of these license agreements, is certainly admissible for purposes of showing the understanding of such party, and if it is upon an understanding that it might be desirable to use patents for purposes of price fixing, we contend that that shows subterfuge.

Justice Stephens: Well, I think that raises the same question that we passed on with respect to Exhibit 324, which had to do with the admission or asserted admission of Certain-teed in respect of the Beaver Products litigation. We ruled there that the mere admission of one alleged co-conspirator, although valid as against that co-conspirator, was not binding upon other co-conspirators unless it is shown to be in furtherance of or execution of the conspiracy; and we think the same reservation ought
5657 to be made here. The exhibits will be received in evidence, but subject to the usual reservation with respect to declarations of alleged co-conspirators, and not to be held binding upon the other defendants unless shown to be in furtherance of or execution of the conspiracy. We do not make a reservation requiring a showing that these exhibits are Certain-teed's act, because Certain-teed took a license under the Roos patent, on perforated lath, after the receipt of the Spencer letters.

Mr. Bromley: Well, I understand, then, that counsel does not state that he has or expects to produce any other evidence tying this up with any other defendant, and especially with the licensor?

Mr. Steffen: We make no such stipulation, Your Honor.

It is open to us now, I take it, or on rebuttal, to tie up this evidence with other defendants.

Justice Stephens: You have a right to try to do that.

(The documents referred to, marked as Government's Exhibits Nos. 601 and 602, were received in evidence.)

Mr. Steffen: I have one other preliminary matter. I would like to ask Mr. Adams in regard to Mr. Dowd, the reason being that I want to get our witness schedule straightened out.

Mr. Bromley: I wanted to be heard on that entire situation at some convenient time.

Mr. Adams: I, too.

Mr. Steffen: As it was left yesterday, I understood that Mr. Adams was going to contact Mr. Dowd, and
5658 that he would be presented as a witness.

Justice Stephens: What do you want to ask Mr. Adams? Do that first.

Mr. Steffen: I want to make sure that Mr. Dowd will be presented at an early date, so we can get our subpoena out for Mr. Redfield, if the Court rules that way, and get our witnesses scheduled.

Mr. Adams: What I said yesterday, perhaps Mr. Steffen misunderstood. I asked the Court, I think, when the Court would like to have Mr. Dowd presented, because of the fact that it might be difficult for me to get hold of him, and the Court said that he could be presented at the convenience of counsel and the Court. I have not, in the interim, done anything about trying to locate Mr. Dowd, since then. I do not know, as a matter of fact, that Mr. Dowd certainly can not be available in the East earlier than approximately the middle of April. Of course, we adjourn on Friday, anyway, for this period.

Justice Stephens: And take up on the 11th of April.

Mr. Adams: Yes, and I knew that Mr. Dowd could not be here until sometime about the middle of April, so I haven't taken it up with him in the meantime.

Justice Stephens: Will you do so as soon as you reasonably can, and acquaint Mr. Steffen with the probable date when you will bring him here?

5659 Mr. Adams: Yes. I think we can get together on that. As Mr. Bromley said, there is another phase of the matter which he and I would like to discuss with the Court, which we think might possibly be determinative of the whole problem.

Justice Stepehns: We will give you an opportunity to do that, if you wish to, Mr. Bromley, before the close of

the present week's session; but we perhaps ought to get on this morning with the witness on the witness stand, because Mr. Chism, I think, is desirous of getting back to his business. Perhaps at the close of Mr. Chism's testimony you can raise that matter. Can you do that then?

Mr. Bromley: Yes, thank you.

Justice Stephens: Have you any further questions of Mr. Spencer?

Mr. Steffen: No, we have not.

Justice Stephens: Any cross-examination?

Cross Examination

By Mr. Bromley:

Q. Wasn't it your practice, Mr. Spencer, to advise your clients, in situations where you thought a patent was invalid, that while that was your opinion, it was entirely possible that you might be wrong? A. Oh, yes, that is always true, of course.

Q. And did you give that advice to the Certain-teed Company in connection with this Roos patent?

5660 A. I think it appears in the opinions, as I recall it, where I state that—

Justice Stephens: (Interposing) Which exhibit are you referring to?

Mr. Bromley: Do you have in mind, Mr. Spencer, what you said at the bottom of page 2 of Exhibit 602?

The Witness: Yes. I also suggested—

Justice Stephens: (Interposing) That is where you referred to the erudition in patent law of United States District Judges, isn't it?

The Witness: Yes. I also suggested that Certain-teed conduct certain experiments, which I don't think they ever did.

By Mr. Bromley:

Q. Where is that reference, Mr. Spencer? A. That is in the paragraph beginning near the bottom of page 4 of Exhibit 601.

Q. Would you point that out to me, Mr. Spencer, and tell me where the paragraph begins, what the words are?

Justice Stephens: (Leading) "I would suggest that if you wish to avoid the patent", and so forth.

Mr. Bromley: Thank you.

By Mr. Bromley:

Q. Now you say that the tests referred to in that sentence of Exhibit 601 were never made, so far as you know,
5661 is that right? A. I think not. You see, this opinion in 1936 was given shortly before the company changed hands, and as I recall it, they entered into the license agreement shortly after that.

Q. Now, you also pointed out to Certain-teed, did you not, in giving the advice, that a patent issued by the Patent Office is valid on its face? A. That is true, yes.

Q. You pointed out to Certain-teed, didn't you, that patent validity litigation is expensive, and the damages resulting from infringement might be very high? A. I think that is in both opinions.

Q. And you expressed the view to Certain-teed, didn't you, that as a business matter, it might, of course, be advisable for Certain-teed to take a license, even in spite of your opinion? A. I always advise clients to keep out of litigation if they can.

Q. And you, of course, told them, didn't you, Mr. Spencer, that in your judgment it would be unwise for them completely to ignore the Roos patent? A. I think that is in the letters, but I am not sure.

Q. Well, at any rate, in Exhibit 601, you suggest methods of avoiding the patent, do you not? A. Yes.

5662 Q. Particularly on page 3. A. Yes. And, of course, that was the purpose of the paragraph beginning near the bottom of page 4, also.

Q. Beginning with what words? A. "I would suggest".

Q. So that it is true, isn't it, that it was your judgment that Certain-teed would be very unwise completely to ignore the Roos perforated patent? A. That is true.

Q. And you told them that, didn't you? A. Yes.

Q. Now, you do not mean to suggest, in anything that you have said here, that Certain-teed did not act in entire good faith in taking the perforated lath license from USG, do you? A. I think their action was consistent with my opinion.

Mr. Bromley: That is all.

Justice Stephens: Mr. Adams?

Mr. Adams: I have no questions, Your Honor.

Mr. Steffen: We have nothing further, Your Honor.

Justice Stephens: You are excused, Mr. Spencer.

The Witness: Thank you.

(Witness excused.)

Justice Stephens: Do you wish to be heard fur-
5663 ther on the matter that was before the Court last night at the time of adjournment, with respect to the matter of impeachment through the grand jury testimony?

Mr. Steffen: Yes, Your Honor.

Justice Stephens: How long do you wish to be heard?

Mr. Steffen: Only for three or four minutes.

I have a suggestion to make. If Your Honor would care to take the morning recess right now, then we could carry right along following that.

Justice Stephens: Very well. We will take the usual morning recess.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

5664 Mr. Steffen: I have one correction to make. Yesterday, when your Honor asked me how much grand jury testimony there was of this witness, I stated—this was while Mr. Knuff was out of the room—that it started on page 1399 and ended on page 1436. That was a total of 36 pages, approximately. I was looking, at that time, at the volume of grand jury testimony that Mr. Knuff was using.

It appears that in the preceding volume, which contains the testimony for May 2, 1940, Mr. Chism testified on pages 1293 to 1326—a total of 33 pages; on pages 1347 to 1396—a total of 49 pages. That makes a total, all told, of 118 pages of testimony.

We very carefully searched the total testimony again to determine whether the particular pages that we were reading, or having the witness look at yesterday, constituted his whole testimony upon the matter in question, and we are thoroughly satisfied that that is the case.

We recognize that the Court, at the end of the session yesterday, expressed, informally I take it, the opinion that it would be perhaps only fair to allow defense counsel to examine into the grand jury testimony to ascertain whether or not the Government is accurate in saying that the particular pages are the only pages having to do with the metallized board.

I want now to say briefly that from the practice of the Division, and I think that the Court also should con-
5665 sider the position of the Government in this matter, there are 118 pages all told of testimony on various

matters, and that it is a question of being fair to one or fair to the other. The defendants are, of course, entitled to satisfy themselves, or be satisfied, that the testimony in question is the only testimony dealing with metallized board by this witness.

Justice Stephens: Isn't it rather a question of being fair to both, Mr. Steffen?

Mr. Steffen: I should say that would be true, yes.

And to be fair to us, we feel that we would not wish to allow defense counsel to examine at their leisure, or, as Mr. Johnston suggested, that they take the minutes overnight—or at all—the entire amount of testimony.

Justice Stephens: Of this witness?

Mr. Steffen: That is correct.

Now, what we suggest doing as a way out of the predicament is simply to make an offer of proof of the testimony which we are offering to impeach Mr. Chism.

We do that—Mr. Knuff will make that offer—upon our representation, first, that this testimony is the only testimony having to do with the matter in question; and second, with the offer that the Court examine, if it will, the entire testimony to determine whether we have made an accurate and fair selection.

As I understand it, there is no question before the
5666 Court, or was not at the close of the session yesterday?

Justice Stephens: No, because you withdrew the last question.

Mr. Steffen: I don't think there was even a question pending. But we would now like to make an independent offer.

Justice Stephens: You may make an offer if you want to, for the sake of your record, and then we will hear from Mr. Johnston, following which the Court will make a ruling.

Mr. Steffen: Thank you.

Mr. Knuff: May it please the Court, we offer to prove that the witness, H. E. Chism, on May 3rd, 1940, appeared before the Additional Grand Jury of the District of Columbia in the proceedings entitled, "The United States of America v. United States Gypsum Company, et al", and testified as follows—

Mr. Johnston: (Interposing) Now wait a minute—

Mr. Knuff: (Interposing) This is a part of my offer, if your Honor please.

Justice Stephens: That is very true, but we have to hear objections to the offer, if counsel wishes to make them.

Mr. Johnston: I certainly object to his reading that into the record. That is just what we were talking about yesterday, and what we are talking about this morning. I renew my objection of yesterday. If he reads it into the record, then it is there.

5667 Justice Stephens: I thought the Government was making an offer for the purpose of obtaining a ruling to protect its record.

Mr. Knuff: That is right, your Honor.

Mr. Johnston: What are you going to do about keeping it out of the record; will that go out of the record?

Justice Stephens: If the Court rules that the Government is not entitled to make proof of the material contained within the offer, except upon the condition that it submits to you the testimony of this witness for examination, and the Government is not willing to accept this condition, then the Court would reject the offer and would not consider that testimony.

Complete your offer.

Mr. Knuff: I wonder if I hadn't ought to start all over again so that we can get it without any interruptions.

Justice Stephens: You may if you wish; how long is your offer?

Mr. Knuff: It is about a page of typewritten material.

Justice Stephens: Very well.

Mr. Knuff: We offer to prove that the witness H. E. Chism, on May 3, 1940, appeared before the Additional Grand Jury of the District of Columbia in the proceedings entitled "The United States of America v. United States Gypsum Company, et al", and testified as follows:

"Q. Since you became a licensee of United States Gypsum Company on February 10, 1937, have you re-
5668 ceived from United States Gypsum Company any price bulletins covering metallized board? A. I believe the metallized board is included in their regular price bulletins; I am quite sure it is.

"Q. Do you recall having received quotations from United States Gypsum Company covering metallized board? A. Yes, we have.

"By Mr. Kelleher:

"Q. Why were you receiving price lists from USG for metallized board when you were not manufacturing it?

A. We were selling it, distributing it. We paid a royalty on that board.

"Q. Well, now, explain what your understanding of your arrangement with USG was concerning the price at which you would sell board purchased from some other company? A. I don't quite understand that question.

"Q. What arrangement did you have with USG concerning the price at which you would sell metallized board? A. Sell at their regular published price, bulletin price.

"Q. And on the basis of what negotiations did you arrive at such an understanding? A. In accordance with our license agreement.

"Q. Under the terms of your license agreement, are you obliged to sell metallized board purchased from another company at USG prices? A. That would be my interpretation.

"Q. And you did at all times? A. Yes."

That testimony appears on pages 1408 and 1409 of the transcript of the testimony of this witness before the grand jury. This testimony is offered for the purpose of contradicting and impeaching the witness H. E. Chism.

The testimony that is challenged appears on pages 5919 and 5920 of the present transcript.

As a part of this offer, we state that we have exhibited to counsel for the defendants, pages 1406, 1407, 1408, and the first 19 lines of page 1409 of the grand jury testimony.

As a part of this offer, we state to the Court that the testimony appearing on pages 1406, 1407, 1408 and the first 19 lines of page 1409 of the transcript of the testimony of H. E. Chism, constitutes all the testimony given by the witness before the grand jury concerning this subject matter.

As a part of this offer, we further offer to allow the Court to inspect the transcript of all the testimony given before the grand jury by the witness H. E. Chism, in order that the Court may assure itself that no other testimony upon the subject matter was given by the witness.

(The Justices conferred.)

Justice Stephens: Is there anything else from the Government?

Mr. Knuff: I think at this time, on the present state of the record, that our offer is sufficient for any objection, if one is made. I do not know whether an objection will be made or not.

Justice Stephens: The nature of the offer would seem to give the impression that Texas had a metallized board license. You don't contend that, do you?

Mr. Knuff: We do not, your Honor.

Justice Stephens: Is there any objection to this offer?

Mr. Bromley: May it please the Court, I object to the evidence offered, on the ground that it is immaterial, incompetent and irrelevant.

In the first place, the offer is obviously, on its face, incomplete and unfair because all in the courtroom know that there is testimony on pages 1406 and 1407 which bears directly on the testimony which Mr. Knuff has offered to prove. He does not, however, include that in his offer.

Now there may be, in the 118 pages to which reference has been made, evidence which completely explains this. I make that statement because of an experience I had in the criminal case. We went through this very sort of thing in the criminal case, where Mr. Kelleher confronted a witness with a page or two of his grand jury testimony, and after an argument, Judge Goldsborough ordered him to hand the grand jury minutes to me, and I took them
5671 and examined the witness from many other pages than those called to his attention by Mr. Kelleher. The effect of the examination was to show that the witness before the grand jury had changed his testimony and given a corrected answer. That was all demonstrated in the criminal case.

So I say it is not fair, and we should not be asked to rely upon the assurance of Government counsel in the light of that experience.

This situation is a complicated one. The testimony which has been read here, in this offer of proof, is subject to a simple, obvious explanation, if anyone understands the facts of the case.

That explanation is that the metallized board which the Texas Cement Plaster Company sold was board which it manufactured itself in the first instance, under its license, then took it across the street to the National plant and had the foil put on it.

Now as this very offer shows, the Texas Company had to pay a royalty on that board, and did pay a royalty because it manufactured it, and it was patented board manufactured under its general license. The price bulletins fixed the price of that board, as made, before the foil was

put on it, and of course the Texas Company, if it sold that board, had to sell it for at least that price fixed for ordinary board.

Justice Jackson: That is already in the record
5672 through the testimony of Mr. Chism yesterday. He said that they made the board, and brought it to the plant of National, had it metallized, and then brought it back and sold it.

Mr. Bromley: Yes, your Honor, but he didn't take the final step and say why it was that the price of that board was fixed. It was fixed not at the price for metallized board, but at the price for ordinary plain board. Now the explanation is that he went ahead and sold it for a higher price than he could get for ordinary board, because the metallized board was more valuable.

I think this testimony is capable of a simple explanation, and I think we are entitled to show whether that wasn't given before the grand jury; but whether it was or not, counsel should know that that offer is a correct one.

Therefore I think the offer is incompetent and immaterial unless we be given an opportunity to look at it.

Justice Stephens: Do you wish to be heard further, Mr. Johnston?

Mr. Johnston: No, your Honor.

Mr. Knuff: May I be heard further?

Justice Stephens: Yes.

Mr. Knuff: I would like to answer Mr. Bromley in the order in which he took up his presentation to the Court.

Mr. Bromley referred to pages 1406 and 1407 of the grand jury testimony.

5673 There is nothing on pages 1406 and 1407 of the grand jury testimony that in any way contradicts Mr. Chism about what he said on the witness stand yesterday.

Pages 1406 and 1407 of the grand jury testimony relate entirely to the arrangement that Mr. Chism had with the National Gypsum Company as to whether or not he received National Gypsum Company's price lists, and as to how he found out about the National Gypsum Company's prices. He told us on those pages that he would pick up the price lists at somebody else's office. There was some discussion as to why he didn't write to National, and he said it would be rather a delayed manner of getting that information.

So there is nothing on pages 1406 and 1407 that in any way contradicts anything that is said on pages 5919 and

5920 of this record, which is the subject matter that I wish to impeach Mr. Chism on.

On pages 5919 and 5920 of this record, the following appears:

"Q. Your company did sign a contract under the Hite and Hagerty Patents on February 10th, 1937, did they not? A. Yes sir, we did.

"Q. And after you signed that contract, didn't your company receive from USG the metallized board bulletins? A. No sir, I don't think so.

5674 "Q. You don't think so? A. No sir.

"Q. And didn't you have correspondence with USG concerning the meaning of the bulletins that were sent you? A. Not the bulletins, I think I had some correspondence relative to one bulletin.

"Q. What bulletin was that? A. I couldn't tell you now.

"Q. And didn't you have an arrangement with USG that you would sell metallized board in accordance with the terms of USG's bulletins? A. No sir, we had no such arrangement.

"Q. You know Mr. Grant Kelleher, don't you? A. I have met the gentleman, yes.

"Q. Did you ever tell Mr. Grant Kelleher that you had an arrangement with USG to sell metallized board at bulletin prices? A. I don't think I told him anything like that.

"Q. If you had told him about it would you have known it? A. I believe I would.

"Q. Would you say now that you did or you didn't? A. That I did not, that is my recollection.

"Q. You are positive of that? A. Yes sir."

Now I submit that anything that is on pages 1406 and 1407 of the grand jury testimony of course could not

5675 impeach what I have just read from pages 5919 and 5920 of yesterday's transcript, and for that reason I did not offer the testimony appearing at pages 1406 and 1407 of the grand jury testimony. My offer was limited—

Justice Stephens: (Interposing) Mr. Knuff, I don't understand Mr. Bromley to state that you were required to offer that. What he is stating is that the contents of pages 1406 and 1407 indicate that there may be material in the record, like that, which might tend to explain, if counsel were allowed to look at it, the asserted impeachment—isn't that right, Mr. Bromley?

Mr. Bromley: Yes, your Honor, that is right.

Mr. Knuff: I can assure the Court—I read this testimony last night, staying up until two o'clock—that the words "metallized lath", the words "metal lath", or the words, "foil board", do not appear in Mr. Chism's testimony before the grand jury at any other place than 1406, 1407, 1408, and the first 19 lines of page 1409.

I make that representation to the Court as an attorney, that there is no place in that grand jury testimony that even mentions the word "metallized," other than I have indicated, and we offer it to the Court, for the Court's perusal, that is the entire testimony of Mr. Chism, and we feel confident that if the Court will examine that testimony, the Court will sustain the position that I have taken. There can be no question—

5676 Justice Stephens: (Interposing) There is no question about the good faith of counsel's representations, Mr. Knuff, you needn't argue that.

Mr. Knuff: Thank you. There can be no question that the purpose of their request in this case is nothing more nor less than a fishing expedition—

Mr. Johnston: If the Court please, I resent that statement—

Justice Stephens: (Interposing) Express your resentment a little later. Let's hear what Mr. Knuff has to say.

Mr. Knuff: They want to find out, as defendants have from time to time, almost from the beginning of grand jury investigations, what a witness has testified before a grand jury, and I submit that the courts have uniformly held that whether the request is made when the witness is called upon to testify, or whether the request is made concerning a plea in abatement on the basis of a motion to quash an indictment, or whether the question is raised on a motion to inspect grand jury minutes for irregularities that might appear before the grand jury—the courts have been almost uniformly consistent in their rulings that a defendant does not have that right.

Mr. Johnston has said that this is an unfair proceeding that the Government has access to these grand jury minutes.

Of course the Government has access to these grand
5677 jury minutes. It has always been the practice to allow the Government to have access to the grand jury minutes. Government's counsel appears before the grand jury. We are not asking the Court to create for us any new right, we are simply asking the Court to preserve

a right which the Courts have consistently said that we have.

Justice Stephens: Are you through?

Mr. Knuff: Yes, your Honor.

Justice Stephens: Mr. Johnston, do you wish to be heard?

Mr. Johnston: Just to express my resentment of that kind of a statement, I think it is entirely improper and I don't think it is justified at all.

Mr. Bromley has restated my objections of yesterday, and I see no difference between this offer and the question that came up yesterday.

Justice Stephens: We think there is no basis in the record, and no basis in any conduct on the part of counsel for the defendants, which would warrant Government counsel charging them with carrying on a fishing expedition, which is a charge of an improper examination of the grand jury minutes.

The Court will rule on the matter, except that before doing so, the Court will ask Mr. Levi, who has been introduced to the Court this morning as Mr. Berge's first assistant, if he wishes to be heard on this matter.

Mr. Levi: No, I think not, your Honor.

5678 Justice Stephens: The Court has very carefully examined, since last night's recess, the case of U. S. v. Socony-Vacuum Oil Company, 310 U. S., 150, and particularly that portion in Topic VI, beginning at page 231, and running to the top of page 237, which has to do with the use of grand jury testimony in the course of a trial.

The Court thinks that the statement made by the Government yesterday concerning that case was not a correct statement of the case, and the Court wishes to call attention to some one or two items in respect of the case and its meaning, as well as to state the basis of the ruling which it is about to make.

The Court calls particular attention to the fact that in that case the minutes were being used only for the purpose of refreshing the recollection of the witness, and not for the purpose of impeachment, and that the ruling clearly, or by clear implication, differentiates the practice in respect of refreshing recollection and the practice concerning impeachment.

The Court calls attention also to the fact that in that case those portions of the grand jury minutes which were examined upon for the purpose of refreshing recollection

were read to the witness by the Judge in the presence of defendants' counsel, so that they were not withheld from the attention of defendants' counsel, they were read in the courtroom.

The Supreme Court said: "* * * the court adopted
5679 the practice of inspecting the transcript and itself seeking to refresh the witness' recollection by reading from his prior testimony. At no time was the transcript shown to the witness."

Obviously, therefore, the reading must have been out loud in the courtroom; otherwise, the witness wouldn't have known what was in the transcript.

Now the Court has these observations to make upon the position of the Government.

In the first place, the use of minutes to refresh recollection is quite different from their use in respect of impeachment:

First—items which are used merely to refresh recollection are not put in evidence.

Second—if the part that is shown to a witness for the purpose of refreshing his recollection does not refresh his recollection, adverse counsel would not be interested in further portions to seek to refresh recollection—there would be no point in that.

Third—If the part shown to the witness does refresh his recollection, then other portions, if shown to the witness, could hardly, to coin a phrase, "unfreshen it".

Hence, there could be no harm in not showing all of the evidence, all of the witness' testimony, to adverse counsel in respect of refreshing recollection, and all that the Court
5680 in the Socony-Vacuum case held, Mr. Knuff, was that under the practice adopted there it was not prejudicial error to decline, under those circumstances to submit the actual minutes to adverse counsel, since their use was merely to refresh recollection, and since they were read out loud in the presence of adverse counsel.

Now contrast that with their use for impeachment. In the first place, the impeaching portion is put in evidence, that is to say, the orthodox practice in respect of impeachment is to ask the witness on his examination what he said, and then, after he has stated that, ask him if he didn't make a different or contrary statement elsewhere, and if he denies that, show him or prove to him the contradictory statement

and put that in the record, so that the Court can determine what the nature of his credibility is.

The impeaching material is, of course, itself not direct evidence on the merits of the case, but it is in evidence in order that the Court may compare it and test credibility.

Second, other portions of a witness' statement, or other statements that he may have made in the course of the grand jury proceedings, may, if examined, prove to modify the effect of the impeaching material. Therefore, to withhold the witness' testimony from inspection of adverse counsel would be to deprive him and his client of the possible opportunity of qualifying or explaining the asserted impeaching material, and the opportunity, therefore, of attempting to re-accredit the witness in respect of what adverse
5681 counsel regards as favorable or truthful testimony.

No rule of which we are aware, and certainly not the Socony-Vacuum case, compels a party to rely upon the judgment of his adversary or his adversary's counsel as to what is a fair selection of material from previous testimony used for impeaching purposes, or upon the Court's selection of such material, and examination of such material. Such a rule would deny to a party, pro tanto, representation by his own counsel.

Such a rule would be obviously unfair, it would be a revival of Star Chamber proceedings, Star Chamber methods. It would deny to one of the parties to the case the opportunity of seeing material shown only to the Court and to the prosecuting authority.

The fact that this is a Government-called witness cannot affect the foregoing, for the attempted impeachment is upon testimony regarded by the Government as favorable to the defendants. It is for that reason, obviously, that the Government wishes to impeach this witness.

In addition to what I have said concerning the Socony-Vacuum case, and at the possible risk of some repetition, I wish to state further that the Socony-Vacuum case determines flatly and clearly that the use of grand jury minutes for the purpose of refreshing recollection, and, impliedly in respect of impeachment, is within the discretion of the trial judge.

All the Court held in the particular case was that it was not an abuse of discretion, that no prejudicial harm
5682 had been shown, for the Court to use the minutes, or allow the minutes to be used as they were in that case.

Second, the Court held that the reason for secrecy had

passed, the grand jury proceeding having entirely ended.

Third, the Court clearly differentiated between impeachment and refreshment, so far as the need of displaying the witness' testimony to adverse counsel is concerned.

Fourth, the Court held in terms, at page 233, that: "Normally, of course, the material so used must be shown to opposing counsel upon demand, if it is handed to the witness."

The rule of the Department of Justice which has been asserted to exist, not to disclose grand jury minutes indiscriminately, may have some proper foundation, but that is one thing, but one entirely different from the situation which is presented here in the courtroom.

To lift the veil of secrecy in the prosecutor's office, or in respect of the grand jury minutes in the possession of the prosecutor, for his own use and advantage in the courtroom, and then to lower it again as against the adverse party, is an entirely different thing from withholding the grand jury minutes from indiscriminate inspection in the Department of Justice, and in the opinion of the Court it would be a grossly unfair proceeding, which a court of equity ought not permit.

The conclusion of the Court is that if the testimony
5683 of the witness before the grand jury concerning metallized board, the prices charged for it, and the like, is to be used for the purpose of impeachment by the Government, all of the testimony of the witness must be displayed to the Court and to adverse counsel, and also, subject to the Court's ruling after inspection and after hearing the Government and adverse counsel, to the witness. If the Government does not wish to abide this rule, then the use of that portion of the minutes selected by the Government for impeachment, and offered, is denied.

It is for you to choose, gentlemen for the Government; if you wish to conduct this proceeding in the manner which the Court regards as fair to both parties, then this offer of allegedly impeaching material may be received; but if you wish to abide the rule of the Department of Justice, that this material is not to be disclosed to adverse counsel and to the witness, then we reject the offer.

I may say that my colleagues fully concur in all of this ruling and in all that I have said.

Mr. Steffen: I want to say just briefly in regard to your Honor's last statement concerning the rule of the Department of Justice, that we had no purpose at all to set up a rule which, as you have pointed out, is for our

own guidance, in opposition to anything that this Court should rule was what the law is on the subject, and
5684 we of course would be guided by our own conduct of the case, and as I say, we had no intention and no purpose to have that treated as in any way in contradistinction to the Court's ruling upon the law.

Justice Stephens: Very well.

Mr. Steffen: We still feel that it would not be desirable, in the conduct of our case, to take the time or to permit the full examination of Mr. Chism's testimony at this time. We have other questions that will come up, and we would rather not have all of that testimony examined now.

Justice Stephens: I might add this—in fact I intended to add it—that if the minutes of the witness' testimony are to be inspected, that is to say if you choose to make your offer upon the terms which the Court has laid down, if they are to be inspected by adverse counsel, the Court within its discretion would rule that the inspection should take place in the courtroom, not, Mr. Johnston, because of any doubt that it would be used improperly if taken out of the courtroom, but because grand jury minutes are frequently in only one set, and an accident on the street or elsewhere might possibly destroy them in some manner.

Mr. Johnston: That is entirely satisfactory.

Justice Stephens: Then the Court understands that the Government now chooses not to submit the minutes to the inspection of adverse counsel. Therefore, the Court's ruling will be made final that the offer is rejected.

5685 Mr. Knuff: Mr. Chism, take the stand, please.

Thereupon, C. E. Chism resumed the stand and testified further as follows:

Direct Examination (Resumed)

By Mr. Knuff:

Q. Am I correct in my understanding, Mr. Chism—

Justice Stephens: (Interposing) I may add one other thing to what I have said, which I think the Government ought to consider before it makes an ultimately final choice in this matter, and that is that the Court in this case is interested in finding the truth, the real facts in respect of this situation, and if this witness has contradicted himself in some manner so that his testimony here is asserted by the Government not to be dependable, the Court would like to know about those facts, because the Court has the duty of determining ultimately the truth and the accuracy

of the facts with respect to this case, and if the Government decides not to use this allegedly impeaching testimony upon the terms fixed by the Court, the Government should have in mind that it is withholding from the attention of the Court what the Government has asserted is material which would affect the credibility of this witness.

You may proceed, Mr. Knuff.

5686 By Mr. Knuff:

Q. Mr. Chism, my understanding is—and you correct me if I am wrong—that sometime in September, 1938, you received a letter from the United States Gypsum Company offering to execute a license to the Texas Cement Plaster Company concerning perforated lath; is that correct? A. I don't recall the exact date. We did receive a letter to that effect in 1938.

Q. I would like to show you a letter from the United States Gypsum Company, and ask you if your recollection as to the date could be refreshed from reading it?

Mr. Knuff: We are not offering this as an exhibit, Your Honor, and don't intend to. We are simply trying to fix the date, that is all.

The Witness: Yes, sir, that is the letter we received.

Justice Stephens: Show it to defendants' counsel, please.

(The document referred to was handed to defendants' counsel for examination.)

By Mr. Knuff:

Q. Has your memory been refreshed as to the date when you received the letter? A. Yes, I noticed the date, September 16, 1938.

Q. Now, previous to receiving this letter, my understanding is that you were manufacturing perforated lath

5687 for a period of 2 or 3 months previous to that time; is that correct? A. Well, I couldn't say about the exact period of time, there. We were manufacturing perforated lath along about that date.

Q. And if I understand your previous testimony, it is that that was just a matter of a few months, whether it would be 2, or 3, or 4, it was a short time before that? A. That is right.

Q. Now, before you started to manufacture perforated lath, I believe that you were buying perforated lath for about a year and a half, from National Gypsum Company;

is that correct? A. Something like that period of time, yes, a considerable period of time.

Q. Your second license with USG was dated February 10, 1937, was it not? A. Yes, sir.

Q. And it was about the time of that second license that you started to purchase perforated lath from National Gypsum Company, or shortly thereafter? A. It might have been shortly after that, or it might have been a little before that, I don't know.

Q. But it was around about that time? A. Around that period, yes.

5688 Q. Now, for some time, perforated lath sold at a differential of 25 cents a thousand square feet above regular lath; is that correct? A. Yes, that is my recollection.

Q. And did your company maintain that differential—

Mr. Bromley: (Interposing) I object to that as calling for a conclusion, and therefore incompetent, so far as the use of the word "maintain" is concerned.

Justice Stephens: Sustained. Ask what the prices were.

Mr. Knuff: If Your Honor please, I am not trying to prove what the price was, I am simply trying to prove the differential; and if, under the ruling that the Court has made before—and I am not questioning it now—we have to go into all these invoices, I am afraid—

Justice Jackson: (Interposing) I think the objection is as to the form of your question.

By Mr. Knuff:

Q. Was there a differential in price on perforated lath over regular lath? A. There was.

Q. And what was that differential? A. Twenty-five cents per thousand square feet.

Q. And did you sell perforated lath that you purchased from National Gypsum Company, at a differential of

5689 25 cents over and above the price of your regular lath? A. Yes, sir.

Q. And you maintained that differential for how long a time?

Mr. Bromley: I object to this as immaterial, and I object to the form of the question in so far as the use of the word "maintain" is concerned. There isn't any charge in the complaint that has to do with Texas and a differential, as I understand it.

Justice Stephens: What is your contention with respect to its materiality, Mr. Knuff?

Mr. Knuff: It is material, Your Honor, because there is a charge in the complaint that the defendants were regulating prices, and we have a situation where the United States Gypsum Company, and all the licensees of United States Gypsum Company, were selling perforated lath at a differential of 25 cents above the regular lath.

Justice Jackson: There is no dispute about that, is there?

Mr. Knuff: This company was not a licensee under the perforated lath agreement, but we contend that from the fact that this company was selling at a differential of 25 cents, the Court can infer that there was an understanding, or an arrangement to fix the prices, between this company and the other defendants.

5690 Justice Jackson: Well, he has already said that he sold it at a differential of 25 cents per thousand square feet. What more do you want? Do you want to ask him whether he always did that? If so, ask him when he quit?

Justice Stephens: The Court will overrule the objection as to materiality, but will sustain the objection as to form.

By Mr. Knuff:

Q. At any time after 1937, did the price of perforated lath and the price of regular lath become the same?

Mr. Bromley: I object to that, unless he indicates whose price he means.

Mr. Knuff: I am talking about your price, and you understood that, didn't you?

The Witness: Yes, I think I understood that.

Justice Stephens: I didn't understand it, myself. I thought you were asking about prices generally, Mr. Knuff. But if you understand that Mr. Chism, you can answer that question.

Justice Jackson: In respect of your company.

The Witness: They did become the same, with respect to our company, at some time after this period when the 25-cent additional price was charged.

By Mr. Knuff:

Q. It was your understanding, was it not, that National Gypsum Company, at the time you purchased perforated lath from them, was not a licensee of

5691 USG? A. I didn't know.

Q. Didn't you write a letter to National in order

to find out whether they were or not? A. I don't recall whether that was before or after we were charging this 25 cents additional.

Q. I am not talking about the 25-cent differential now, I am talking about the time that you purchased lath from National Gypsum Company. At that time, you knew that National Gypsum Company was not a licensee of USG? A. Yes, I believe I knew that.

Q. And your company was never a licensee of USG under the perforated lath agreement, which related to Patent 1,938,354, was it? A. No, we never were.

Q. And your company has manufactured perforated lath since sometime in 1937 down to the present time, is that correct? A. Yes, I believe so, somewhere around in 1937.

Q. Has USG ever instituted any patent infringement suit against Texas Cement Plaster Company?

Mr. Bromley: I object to that as immaterial.

Justice Stephens: What is your contention with respect to that, Mr. Knuff?

Mr. Knuff: Our contention with respect to that, Your Honor, is that we have said that the patent license
5692 agreements were not bona fide license agreements.

The fact that his company is manufacturing a perforated lath, and the fact that USG has never instituted any infringement suit to challenge the right of this company to manufacture perforated lath, would certainly be evidence of whether or not these license agreements were entered into bona fide, whether USG was acting in good faith, or whether they were acting in bad faith.

It seems to me that if USG felt their patent position was sound and strong, that the first thing USG would do would be to institute infringement proceedings.

Now, of course, USG can explain that, but I say from that evidence the Court can infer that the patent license agreements on perforated lath were not bona fide.

(The Justices conferred.)

May it please the Court, we will expedite the ruling and withdraw the question.

Justice Stephens: Very well.

By Mr. Knuff:

Q. I show you, Mr. Chism, what has been marked for identification as Government's Exhibit 603, the same being a letter dated March 16, 1939, addressed to the United

States Gypsum Company, and signed Texas Cement Plaster Company by H. E. Chism.

(The document referred to was marked as Government's Exhibit No. 603 for Identification.)

5693 (Government's Exhibit No. 603 for Identification was handed to the witness.)

By Mr. Knuff:

Q. I first want to ask you whether that is your signature? A. Yes, sir, it is.

Q. Yesterday, at page 5919, I asked you this question:

"Q. And didn't you have correspondence with USG concerning the meaning of the bulletins that were sent you?"

And your answer to that was:

"A. Not the bulletins, I think I had some correspondence relative to one bulletin."

Is this the correspondence that you had in mind? A. This is the letter, yes.

Mr. Knuff: I offer in evidence Government's Exhibit No. 603.

Mr. Bromley: We make the usual objection; and also object to it on the ground that it is immaterial to any charge in the complaint.

Justice Stephens: The objection as to materiality is overruled; it is received in evidence subject to the usual reservation with respect to declarations of alleged co-conspirators.

Mr. Finck: If Your Honor please, may I also note the objection of National as to immateriality?

5694 Justice Stephens: Yes, that may be noted, and it is overruled.

(The document referred to, marked as Government's Exhibit No. 603, was received in evidence.)

Mr. Knuff: I haven't any further direct.

Justice Garrett: May I ask you, for my information, was there both a metallized board and a metallized lath?

Mr. Knuff: I think there is, but I am not certain. Maybe Mr. Chism can answer Your Honor's question.

The Witness: Yes, there was.

Justice Garrett: I notice in the first paragraph of Exhibit 603 it refers to metallized gypsum board; and in the second paragraph it refers to metallized lath.

Justice Stephens: We will take the noon recess at this time.

(Thereupon, at 12:15 o'clock p.m., a recess was taken until 1:45 o'clock p.m., of the same day.)

5695 AFTERNOON SESSION

(The trial was resumed at 1:45 o'clock p.m., pursuant to recess.)

Justice Stephens: Take the witness stand, Mr. Chism.

Thereupon, H. E. CHISM, the witness on the stand at the time of recess, resumed his testimony as follows:

Direct Examination (resumed)

By Mr. Knuff:

Q. Mr. Chism, I show you what has been marked for Identification as Government's Exhibit 51.

(The article referred to was marked as Government's Exhibit No. 51 for Identification.)

(Government's Exhibit No. 51 for Identification was handed to the witness.)

By Mr. Knuff:

Q. Will you tell us what that exhibit is, please? A. That is the Texas brand of gypsum wallboard.

Q. What thickness? A. Three-eighths.

Q. And for how long have you been manufacturing this type of wallboard, sir? A. Since probably the latter part of February, 1937.

5696 Q. And this is the type of wallboard that is regularly and customarily sold to the wallboard trade, is that correct? A. Yes, sir.

Q. This is the type of board that is sold to your regular dealer trade? A. That is right.

Q. I show you, Mr. Chism, what has been marked for Identification as Government's Exhibit 52.

(The article referred to was marked as Government's Exhibit No. 52 for Identification.)

(Government's Exhibit No. 52 for Identification was handed to the witness.)

By Mr. Knuff:

Q. Will you tell us what Government's Exhibit No. 52 for Identification is, sir? A. That is the plain gypsum lath.

Q. It is the type of 3/8-inch gypsum lath that is manufactured by the Texas Cement Plaster Company, is that right? A. Yes.

Q. And for how long have you been manufacturing this same type of lath? A. For the same period.

Q. And this is the same type of lath that is regu-
5697 larly and customarily sold to your dealer trade, is that correct? A. Yes.

Q. I show you what has been marked for Identification as Government's Exhibit 53.

(The article referred to was marked as Government's Exhibit No. 53 for Identification.)

(Government's Exhibit No. 53 for Identification was handed to the witness.)

By Mr. Knuff:

Q. Will you tell us what that is, please? A. That is a sample of the perforated gypsum lath that has been manufactured by the Texas Cement Plaster Company since sometime after February 10, 1937.

Q. It was made during the year 1937—I don't mean this particular board, but this particular type of board—was this particular type of board put into production sometime during the year 1937? A. No, I think it was put into production in 1938.

Q. In 1938? A. Yes.

Q. And what type of board were you producing in 1937, if you were producing any? A. We were producing the plain lath.

Q. You weren't producing any perforated lath in
5698 1937? A. That is my recollection now, that we didn't commence producing that until 1938.

Q. And this is the same type of lath that is sold to your dealer trade regularly and customarily, is that correct? A. Yes, it is.

Q. Mr. Chism, you have also been asked to produce for us certain strips containing patent markings. I don't believe you have those with you today, have you? A. I don't believe I have, no, sir.

Q. You will, at your earliest convenience, procure those and send them to us, will you? A. I will be very glad to.

Mr. Knuff: That is all of the direct-examination, Your Honor.

Justice Stephens: Are you offering these exhibits?

Mr. Knuff: Not at this time.

Justice Stephens: These exhibits are only sections, aren't they?

The Witness: Those have just been cut from the larger pieces.

Justice Stephens: What is the difference between the plain lath and the plain board?

Justice Jackson: The size?

The Witness: The size, for one thing. The lath standard size is 16 x 48, and the larger board is 4 feet wide
5699 and any length from 6 to 12 feet.

Justice Stephens: How about thickness?

The Witness: The thickness varies in the wide board. We only manufacture the 3/8 in the lath.

Justice Stephens: You may cross-examine.

Your last question of this witness, Mr. Knuff, reminds me to ask Mr. Varian, for Ebsary—he is not here, is he?

Mr. Oliver: No, he is not here.

Justice Stephens: Very well. You might tell him, Mr. Oliver, that Mr. Lenci was to furnish the Court some samples for our files. They haven't been received as yet.

Mr. Knuff: I have them over at my office, they sent them to me, Your Honor.

Justice Stephens: I see. All right, you may furnish them at your convenience.

Cross Examination

Mr. Bromley: May I see Exhibits 51 to 53?

(Government's Exhibits Nos. 51 to 53, inclusive, for Identification, were handed to Mr. Bromley.)

By Mr. Bromley:

Q. These exhibits, Mr. Chism, 51 to 53 for Identification, of course are not sold to the trade at all, are they, these little pieces? A. Not the little pieces.

5700 Q. These are just out from— A. (Interposing) They are cut from the larger standard sizes.

Q. Now in addition to the differences which you mentioned to the Court, in answer to the questions of the Presiding

Judge, Exhibit 51, the wallboard sample, shows that its edge is perfectly square, doesn't it? A. Yes, that is right.

Q. Whereas, Exhibit 52, the lath sample, has a rounded edge? A. That is right.

Q. Now is there any reason for that difference in edge, in connection with the use of the respective boards? A. Yes, I think there is.

Q. The wallboard, when erected on the studs, is not plastered over, is it? A. That is correct.

Q. So that it is important, when wallboard is used as an interior finish, to have as close fitting a joint as possible so that the smooth effect of the wall will not be marred by a crack or a joint; isn't that right? A. Yes, sir.

Q. That is not necessary, so far as lath is concerned, because lath is plastered over by coats of plaster; isn't that right? A. No, it is really better to have the
5701 round edge so that it will create a bond for the plaster to stick tighter.

Q. And it is the fact, isn't it, that a square edge is a more difficult edge to make? A. Yes, it is.

Q. Now, there is another difference between the lath and the wallboard, isn't there, in so far as the paper is concerned? A. Yes, there is quite a difference in the paper.

Q. What is that difference? A. Well, the big board has what we call an ivory face, it is cream-colored paper on the face side of it, which is heavier, and it is also a sized paper. The lath does not have that paper on it. It is more porous and it is unsized.

Q. And that is because the wallboard, after erection, not being plastered over, is in a condition to be decorated by paint? A. That is right.

Q. Therefore, you want as smooth and as regular a surface on wallboard, at least on the side exposed to the interior of the room, as possible, don't you? A. Yes, I would think so.

Q. So far as the lath is concerned, the type of paper must be entirely different from the wallboard paper, because the plaster gains its adherence to the wall merely by the crystals of the plaster impinging into the
5702 paper of the lath, isn't that right? A. Yes, it penetrates the paper.

Q. And therefore, you have to use, in lath, an unsized, soft paper, do you not? A. Yes, sir.

Q. So that plaster will adhere to it? A. That is right.

Q. You said in your direct-examination, between lines 1 and 10 of page 5900, that you took no part in the negotiations leading up to the execution of Exhibit 599, which is the Texas license of April 18, 1927—do you recall that? A. Yes, I recall that.

Q. It is a fact, isn't it, that you did participate in discussions with Mr. Gloyd, and others within your company, as to the advisability of taking a license? A. Yes, I did.

Q. And all you meant by your answers on page 5900 was that you, yourself, did not participate in discussions with any representatives of the licensor, United States Gypsum Company? A. That is correct, yes.

Q. You were familiar, weren't you, Mr. Chism, with the discussions had by Mr. Gloyd and others within his organization, and the reasons which motivated Mr. Gloyd to take this license, Exhibit 599? A. Yes, I knew
5703 quite a bit about it.

Q. You also testified on direct-examination, at page 5900, beginning at line 11 and running to the bottom of the page, that there were no patent studies or patent surveys made by Texas Cement Plaster Company before Exhibit 599 was executed. Do you recall that? A. Yes, sir, I remember that.

Q. Now, what were the reasons which caused Mr. Gloyd to take this license of April 18, 1927, Exhibit 599? A. Before that time, we were making an open-edge board, which proved to be very unsatisfactory to our trade and caused us to lose business, and we were constantly losing more; and the cost of manufacture was high, due to loss from bad board, what we called "peelers", and broken edges, and so forth, which made it almost prohibitive. We had to find some way to make a better board.

Q. And what about the attitude of your trade in 1927, as to whether they preferred the closed-edge or the open-edge type of board?

Mr. Knuff: May it please the Court, I didn't object to the last question, although I do think it was going beyond the scope of the examination-in-chief, and also I thought at the time that it was asking the witness to give hearsay testimony. I am not going to move to strike that testimony, but in view of the fact that this is going far beyond
5704 the scope of the examination-in-chief, I think I will and must object to it. He wasn't asked anything on direct-examination concerning the attitude of the trade, or anything else.

Justice Stephens: He was asked about taking out these licenses. Isn't defendants' counsel entitled to go into the reasons for taking them out?

Mr. Knuff: The question that I asked him about the licenses was—did he participate in the discussions with USG, and I think that was the way the witness understood it. I didn't ask anything about any discussions with any other person.

Justice Stephens: But you have offered the license in evidence, and you put him on as your witness to testify about the business of the company.

What do you say, Mr. Bromley?

Mr. Bromley: I say that it certainly is proper cross-examination just resulting from the fact that through this witness the license agreement was offered and received in evidence. But further than that, counsel brought out from this witness that there were no patent studies made, and I am attempting to develop the reason for that, what he knew about the patents, without any studies.

Justice Stephens: The objection is overruled.

By Mr. Bromley:

Q. You knew, didn't you, that this closed-edge
5705 board was a patented product? A. I had understood that it was, yes.

Justice Stephens: The question to which objection was made wasn't answered. If you want an answer to it, you are entitled to it.

Mr. Bromley: Yes.

Will you read it, please?

(The question was read by the reporter as follows:

"Q. And what about the attitude of your trade in 1927, as to whether they preferred the closed-edge or the open-edge type of board?")

The Witness: The attitude of the trade was that they preferred the closed-edge board, and we had to do something pretty quick to protect our business. The open-edge board just wasn't proving satisfactory.

By Mr. Bromley:

Q. And open-edge board was getting increasingly difficult to sell to the trade, wasn't it? A. That is right.

Q. Now, wasn't it your understanding, also, that USG owned patents on the machine necessary to make the

closed-edge board? A. I think I knew that at the time. I am sure that the officers of the company did.

Q. And wasn't it your understanding, also, that
5706 USG had other patents which you concluded would be useful in the manufacture of gypsum board, such as the recessed edge, for instance? A. Yes, sir, I remember that.

Q. And the tongue and groove patent? A. Yes, that is true.

Q. Therefore, wasn't the primary reason of the Texas Cement Plaster Company for taking the license, the reason that it wanted to get the right to manufacture board under patents which you understood the United States Gypsum Company owned? A. Yes, it was.

Q. And as soon as you took out the license, or shortly thereafter, did you commence to make the closed-edge board at your plant? A. Yes, sir, we did.

Q. And have you made the closed-edge board at all times from that time down to the present time? A. Yes, we have.

Q. And after you took your license of February 10, 1937, did you commence to make this so-called light-weight or foam-bubble board? A. Just as soon as we could change our machinery or equipment.

Q. And have you continued the manufacture of
5707 that foam or bubble board down to the present time?

Mr. Steffen: Your Honor, I would like to have that simply as a general understanding of the present witness, if I may. I think that is the purport of the question, and that it does not go to the question of whether they were complying strictly with the patent.

Justice Stephens: I see what you mean.

Read the question.

(The question was read by the reporter.)

Justice Stephens: It doesn't seem to me, Mr. Steffen, that that question, as phrased, asks the witness to testify whether it was made under the patent or not. The objection is overruled.

Mr. Steffen: I simply wanted to be sure as to that.

Mr. Bromley: Will you answer that?

Justice Stephens: Read it again to the witness.

(The question was re-read by the reporter.)

The Witness: Yes, we have.

By Mr. Bromley:

Q. And since February 10, 1937, have you used starch to obtain bond between the paper and the core of your board? A. Yes—

Mr. Steffen: (Interposing) Your Honor, I think that does transgress the direct-examination. There was no question as to the composition of the board, or what
5708 was done by way of manufacturing the board.

Justice Stephens: What do you say to that, Mr. Bromley?

Mr. Bromley: It certainly goes to the charge of subterfuge. He has interrogated this witness about the license, and the charge in the complaint is that it was a subterfuge and not used in good faith, and it seems to me that I am entitled to show, on cross-examination, that the license and the patents were used by this witness in the manufacture of their board. He has said here that he made no patent studies before he took the license. That obviously was offered for the purpose of attempting to convince the Court that the license didn't mean anything to this licensee, that it was a fake or subterfuge. It certainly does not go beyond the limits of proper cross-examination for me to ask this witness if he didn't manufacture the board with the use of starch, because one of these patents covered the use of starch.

Justice Stephens: Objection overruled.

Read the question to the witness.

(The question was read by the reporter.)

The Witness: Yes, we have.

By Mr. Bromley:

Q. And isn't it the fact that after you took your license of February 10, 1937, USG sent engineers down there and instructed you how to manufacture this foam or
5709 lightweight board? A. They did, immediately after signing the agreement.

Q. And they showed you the patents, and they gave you drawings and blue-prints, and supervised the installation of the new machinery and taught you how to use it, didn't they? A. They did.

Q. And they gave you information with respect to the use of such patents as the recessed edge patent, didn't they? A. Yes, they did.

Q. In fact, isn't it true that with respect to every development that you used, in improving the quality of the board,

which you felt came under your license or the USG patents, you went to USG and received instructions from them and the "know-how" as to how to use the patents and the inventions? A. I believe that is correct in every instance.

Q. Now, you have told the Court that the price fixing provision under Exhibit 599, the 1927 license, expired on August 6, 1929. That is right, isn't it? A. Yes, sir.

Q. Now, isn't it true that your prices were not controlled thereafter, by anybody, until you took the license of February 10, 1937? A. That is correct.

Q. And you understood at all times, didn't you, that the price fixing provisions in the two licenses which you
5710 took, only applied to patented board manufactured and sold by you under the license? A. Yes, I did.

Q. And during the interim between August 6, 1929, and February 10, 1937, you never received any price bulletins at all? A. No, sir, we did not.

Q. Did your company, so far as you know, have any agreement or understanding on plaster prices, or the prices of miscellaneous gypsum products? A. No, we didn't.

Q. You never took, you told us, a license to manufacture metallized board, did you? A. We never did, no, sir.

Q. As a matter of fact, Mr. Chism, your company had no interest, or at least very little interest, in marketing metallized board, did you? A. Practically none at all.

Q. There wasn't any demand for it down in your country was there? A. Very little demand.

Q. Have you any idea of the amount of metallized board which you have sold up to the present time, over the entire period that you sold it? A. Approximately two carloads.

5711 Q. And that would be expressed, in thousand square feet, as how many thousand square feet? A. Somewhere between 80,000 and 90,000 feet.

Q. And that is all you have ever sold, at any time? A. Yes, sir.

Q. And this board you manufactured yourself, and took over to the National plant to have metallized, didn't you? A. In most all instances we did that, yes, sir.

Q. The board, then, that you took over to have metallized, was, as you understood it, manufactured under your license agreement and the USG patents? A. It was manufactured under that agreement.

Q. That board which you had National metallize was the same as any other board made under your license, wasn't it? A. That is correct, yes, sir.

Q. Now, am I correct in assuming that we are now talking about a period of time after February, 1937? A. That is my understanding.

Q. And that is your best recollection? A. Yes.

Q. Now, did you or did you not pay a royalty on this board which you had metallized by National, and then sold? A. Yes, we did.

Q. And you paid the royalty because you under-
5712 stood it was manufactured under your general license? A. That is right.

Q. Now, that royalty was the regular, general license royalty, and not any special royalty for metallized lath; isn't that so? A. It was the same royalty we paid for the same kind of board not metallized.

Q. Now, wasn't it your understanding that when you sold this board that you had thus manufactured, whether it was metallized or not, you could not sell it for less than the minimum price established in your general license? A. That is correct, after February 10, 1937.

Q. That is the period of time we are talking about, isn't it? A. Yes.

Q. Now the fact is, isn't it, that when you sold it, you sold it for more than this minimum price? A. Yes, we did.

Q. How were you able to get more for it? A. You mean from the dealer?

Q. Yes, from the dealer. A. You are speaking of the metallized board, now?

Q. Yes. Was it worth more, or how did you happen to be able to sell it for more? A. We had to get more,
5713 because it cost us considerable money to have it metallized.

Q. How much would it cost to have it metallized? A. Well, anywhere from $7 to $9 or $10 per thousand square feet.

Q. Now, that was an additional cost on top of your cost of manufacturing it in the first place? A. That is right.

Q. Therefore, you would expect to get more for it when you sold it, wouldn't you? A. Certainly.

Q. And you did get more for it? A. Yes.

Q. Wasn't it a more valuable product to the dealer than plain lath, and therefore wasn't that the reason that he was willing to pay more for it? A. It was generally assumed that it was a more valuable product.

Q. Isn't it a fact, Mr. Chism, that this higher price which you were able to get, and did get, for the metallized lath, was not controlled by anybody, and you had no arrange-

ment with anyone with respect to it? A. There was no one that controlled our price on metallized board.

Q. You knew that you were free at all times to sell the metallized board at any price, so long as it was higher
5714 than the minimum fixed in your general license, didn't you? A. Correct.

Q. And you had no understanding or arrangement or agreement with anybody as to what price you would charge for this metallized lath when you sold it, did you? A. No, sir.

Q. Now, did you ever receive from USG a metallized board license bulletin? A. No, sir, I never did.

Mr. Bromley: May the witness be shown Exhibit 603, please?

(Government's Exhibit No. 603 was handed to the witness.)

By Mr. Bromley:

Q. Did you ever receive a reply to Exhibit 603? A. No, sir, I didn't.

Q. You will notice in the first sentence you refer to "your price bulletin applying on metallized gypsum board effective March 1, 1937". Do you see that? A. Yes, I see that.

Q. Now, at or before the time that you wrote this letter, had you seen that document that you refer to here in this exhibit? A. I saw it at the time that I wrote the letter.

Q. Will you tell the Court whether that was a
5715 metallized board license bulletin, or merely a price bulletin or price list of USG? A. I wouldn't know. I knew it was a USG price list, at least. I didn't know what they called it.

Q. How did you happen to get it, will you tell us the circumstances and explain the transaction, please? A. Yes. We had a salesman in Missouri who was calling on our dealer at Warrensburg, Missouri, and he was offered an order with the provision that we could furnish a small amount of, I believe it was, metallized lath; and when the salesman started to take the order, the dealer called his attention to the fact that his price was too high.

Q. For metallized lath? A. For metallized lath, yes. So he compared the price that he had quoted with one that was quoted the dealer in this price list, or price bulletin, and found that our price was too high. So he immediately called me by telephone, and I told him that if such a price had been quoted and he could get written authority for it,

to send that authority in to me, along with the order, and we would accept it and fill the order.

Q. Now, when you said "authority" you meant written evidence of the quotation, didn't yo A. That is right, price list.

Q. You wanted to see the written quotation which
5716 the dealer had told your salesman that the dealer had, didn't you? A. Yes, I did.

Q. In order to check up on his truthfulness when he said he had been quoted a lower price than the one which your salesman had quoted him, isn't that right? A. Yes, sir.

Q. Well, what happened thereafter? Did the salesman send the price list in to you which the dealer had given your salesman? A. He sent the price list and the order, and the order was filled.

Q. But he sent the price list? A. Yes, he did.

Q. And when you got it, you saw that USG was quoting, on metallized board, a price lower than you had told your salesman to quote; is that right? A. Yes, I did.

Q. And you thereafter accepted the order at the lower price, did you? A. Yes, we did.

Q. Now, was your purpose in writing Exhibit 603 anything other than merely to find out what the market price in the market was, in this area? A. That is what I was interested in.

5717 Q. And is that all you were interested in? A. Yes, sir.

Q. And you didn't write Exhibit 603 because you had any agreement or understanding with USG at that time, or before or after that time? A. No, sir, I did not.

Q. And you had no agreement with USG as to what prices you were to charge for metallized lath at any time, did you? A. No, sir.

Q. You said, I believe, that in addition to the board you made yourself, and had metallized, there was a small quantity which you bought from somebody, already metallized; is that right? A. Yes, I believe there was.

Q. Can you tell us about how much that was? A. No, I couldn't. It was probably 10 percent of all that we sold.

Q. Did you include that board in your figure of 80,000 to 90,000 feet? A. Yes, I included in that figure all the metallized board that was sold by us at any time.

Q. Now, did you have any agreement or understanding or arrangement with anybody as to the resale price at which you would sell this small quantity of metallized

board which you bought from some other manu-
5718. facturer outright? A. No, sir.

Q. You told Mr. Knuff that for a time you sold perforated lath at 25 cents more per thousand feet than you charged for plain lath, is that right? A. Yes, we did.

Q. Now, will you tell the Court the circumstances surrounding your first information that you could get a 25-cent higher price for perforated lath than you could for plain? A. This information first came to me from our salesman in Dallas, Texas. In accepting an order there, he called me about it, and I think he first wanted to know if we could furnish that, and I told him we could; and then he wanted to know if he should charge the extra 25 cents on the perforated lath. As I recall it, that was new to me, and I asked him if that was the prevailing custom or price in the market there, and he said it was. I said, "If that is true, I want you to accept the order on that basis."

Q. At a 25-cent higher price? A. At a 25-cent higher price on the perforated lath. And he did that, and we furnished the lath on the order.

Q. That is the first time that you had ever heard that any manufacturer was charging more for perforated than for plain lath? A. Yes, sir, that is the way I remember it.

5719 Q. And up to that time, you hadn't been selling the perforated lath which you sold, at the same price as plain lath? A. I wouldn't say definitely that we had. I believe we had.

Q. At least, you weren't aware of the fact that dealers were paying 25 cents more for it from other manufacturers, up to this time, were you? A. That was the first time that I was aware of such a situation.

Q. Isn't it the fact that the sole reason that you thereafter charged 25 cents more for perforated lath was because you found you could get it? A. That is right, we could get it in the market, and we felt like we were entitled to it.

Q. And did you have any arrangement, agreement or understanding with anyone that you would charge a 25-cent higher price for perforated than for plain lath? A. No, sir.

Q. You never took a perforated lath license from USG, did you? A. No, we did not.

Q. Did you ever receive from USG any perforated lath licensee bulletins? A. No, we didn't.

5720 Q. When did you first start to manufacture perforated lath? A. My recollection is that it was about the middle of 1938, or maybe in the fall of 1938.

Q. And since that time, this perforated lath which you have manufactured and sold is the same kind of lath as is manufactured under your general license, isn't it? A. The same kind of lath, perforated.

Q. That is to say, after you make plain lath under your general license, you then perforate it and it becomes what is known as perforated lath, is that right? A. It is plain lath all the way through until it comes to a certain point on our board machine, and there it is made into a perforated lath.

Q. And that is made with a machine which punches the holes through it while it is still in a wet state, isn't it? A. That is right.

Q. Now the fact is, Mr. Chism, that your company, knowing of USG's perforated lath patent, has attempted to develop a type of perforated board which will avoid the claims of the USG patent; isn't that right? A. We didn't do that entirely alone. We assisted some machinery or equipment company in doing that.

Q. Well, you haven't gone out and made the same kind of perforated lath that USG is making, have you?

5721 A. You mean with reference to the size of the holes and the spacing?

Q. Yes. A. No, we don't make the same kind.

Q. You have been very careful to change not only the size of the holes, but the spacing of the holes, in order to avoid the claim of the USG patent, haven't you? A. Yes, we have.

Q. And did you consult with anybody from the National Company in order to see how you could avoid the claims of USG's patent? A. The National Company?

Q. Yes. A. No, sir.

Q. You worked this out by yourself, did you? A. Yes, in conjunction with our machinery company.

Q. And it is a fact, isn't it, Mr. Chism, that the Texas Company has never had a one-hour fire test on its perforated lath? A. No, we never have gotten a fire rating.

Mr. Bromley: That is all.

Justice Stephens: Is there further cross-examination by other defendants?

(No response.)

Justice Stephens: Mr. Johnston?

5722 Mr. Johnston: No, Your Honor.

Justice Stephens: Any re-direct-examination?

Mr. Steffen: May we have just a moment, Your Honor, please?

Justice Stephens: Yes.

Mr. Bromley: May I have the Court's permission to ask the witness about another subject which I inadvertently overlooked?

Justice Stephens: You may.

By Mr. Bromley:

Q. Mr. Chism, isn't it the fact that prior to the time you took your general license in February, 1937, you did not bundle your lath or wallboard in the same fashion that you did afterwards? A. No, we bundled it differently after receiving that license and signing that agreement.

Q. Prior to the time you took the license, how did you bundle your wallboard and lath? A. We didn't bundle the wallboard at all. We bundled the lath with wire ties.

Q. Will you describe briefly what wire ties are? A. Well, it is more like a baling wire, about the size of a baling wire or a little heavier. I don't know what size of wire you would call it. That was just simply wrapped around the bundle at both ends.

5723 Justice Jackson: Like you would bale hay?

The Witness: Just about the same process, yes, sir.

By Mr. Bromley:

Q. What can you say about whether or not that type of bundling was satisfactory or unsatisfactory? A. It was not very satisfactory.

Q. Why not? A. It caused too much breakage.

Q. And would the wire slip and cut the board, or the lath, rather? A. Yes, it would.

Q. After you took the license, you went to the USG system of bundling by the use of paper strips on both the board and the lath, didn't you? A. That is right.

Q. Have you used that invention ever since that time down to the present time? A. Yes, we have, and are still using it.

Mr. Bromley: That is all.

Justice Stephens: Mr. Bromley, you might bring out, if you care to, and if there is no objection, this matter:

In answer to one of your previous questions, the witness testified that they had sold, in all, approximately 80,000 to 90,000 square feet of metallized board and lath, or two carloads. That might perhaps be contrasted with
5724 the amount of ordinary lath and board manufactured and sold by this company during the same period. In other words, the figures standing alone don't mean much to me; 90,000 feet is a lot of feet to the uninstructed person. Perhaps in comparison with the other board, we could get some idea as to what the amount is, relatively speaking.

By Mr. Bromley:

Q. Can you give us your total production in the years 1937, 1938, 1939 and 1940, by years, of board and lath, in square feet?

Justice Stephens: That is, exclusive of metallized.

Mr. Bromley: Yes.

The Witness: It would average better than 20,000,000 square feet per year in those particular years.

Redirect Examination

By Mr. Steffen:

Q. Mr. Chism, you stated that you changed your system of bundling in 1937; is that true? A. Yes, we did.

Q. And you said you formerly bundled with wire? A. Wire ties, yes.

Q. Was that true of your board? A. Not on board, no, sir.

Q. What was true in the case of board? A. We did not bundle board.

5725 Q. Did you use tape across the ends of the board A. No, we did not.

Q. Did you at any time have a process of using tape on your board for bundling purposes? A. Not for bundling purposes, no, sir.

Q. For what purposes? A. For advertising or decorative purposes.

Q. Did you have a process of tying two sheets of board together with a single strip of paper, by hand, as a type of bundling? A. Not prior to the signing of this agreement.

Q. And after the signing of this agreement, did you consider whether or not that was bundling under your license? A. There was some doubt about it in my mind at first.

Q. Is that the way USG bundles? A. That is our understanding.

Q. What was the doubt in your mind? A. It didn't occur to me that by taping the ends of two pieces of board, taping them together—

Q. (Interposing) By hand? A. I didn't think that that made up a bundle.

Q. And they told you that it did? A. They said it did, and others said it did, and we agreed with them.

Q. So you have been paying a royalty on that
5726 type of bundling? A. That is right.

Q. About this perforated lath, where did you buy your perforated lath when you first started getting it? A. I don't know, for certain. We bought the greater portion of it from National Gypsum Company.

Q. And did you negotiate the purchase? A. No, I don't think I did.

Q. Well, who did? A. Our plant foreman.

Q. Did he just step up and buy some board, some perforated lath? A. He probably called up the superintendent of the other plant and told him he wanted a load of perforated lath, or something of that sort.

Q. Did you or Mr. Gloyd know anything about that? A. Oh, yes.

Q. Did you at any time talk with any representative of National about that? A. I don't believe we ever did.

Q. Did your superintendent, to your knowledge, have any conversation as to the price of the board that he was going to buy? A. We had a pretty general knowledge of the price it was going to cost us.

5727 Q. And do you want to tell the Court here that you had no idea that perforated lath was selling at a mark-up of 25 cents, when you bought all that board from National? A. I don't understand your question.

Justice Stephens: I thought you were asking him about metallized board.

Mr. Steffen: No, perforated lath.

By Mr. Steffen:

Q. You bought perforated lath for a considerable period of time from National? A. We bought some perforated lath.

Q. How much would you say you bought? Not just a car or two? A. No, from National we probably bought, altogether, 8 or 10 carloads.

Q. And my question is this: Did you pay more for that when you bought it from National, than you did plain lath? A. I don't remember now, I think we did.

Q. And yet you are telling the Court, as I understand it, that you didn't know that you would have to sell that perforated lath at a 25-cent differential, until some salesman in Dallas, or somewhere, called you up and said, "I have just learned that there is a mark-up of 25 cents on perforated lath"?

Mr. Bromley: I object to that as incompetent be-
5728 cause assuming facts not in evidence. He didn't testify that he would have to sell.

Justice Stephens: That objection is well taken. He didn't say that he had to sell it. Sustained.

By Mr. Steffen:

Q. Do you want to state that the first you ever heard of the difference in price was when this salesman called you up from Dallas; is that right? A. That is right.

Q. Even though you were buying board at an additional price from National? A. I can't even tell you whether I ever saw the price that National put on that lath.

Q. But you saw the invoices when they shipped it to you, didn't you? You knew you were buying it for more than ordinary board? A. It wasn't my business to look over those invoices.

Q. What was your business in that connection? A. I was manager of the business.

Q. And you were buying several carloads of lath— A. (Interposing) We didn't buy several carloads at a time; ordinarily it was in truckload lots.

Q. Well, that is your story, is it? A. Yes, sir.

Q. The first time you found out at all was when
5729 this salesman called you up and told you that he could get 25 cents more? A. My judgment would be that most of this lath that we bought from National occurred after this incident that I speak of. We bought lath from other sources.

Q. What other sources? A. I can't tell you definitely. I would say that we possibly bought some from Sweetwater.

Q. What does "Sweetwater" mean? A. That is the United States Gypsum Company mill—or through some dealer at that point.

Q. And when you bought it from the United States Gypsum Company, did you know that they were charging you

more for that than for unperforated lath? A. I have no recollection of that now.

Q. It is more expensive to make perforated lath than unperforated lath, is it not? A. A trifle.

Justice Garrett: What was that answer?

The Witness: A trifle, a very small amount.

By Mr. Steffen:

Q. Now going to this matter of metallized board, Mr. Chism, you stated that you bought a quantity, possibly 80,000 feet, of metallized board—

Mr. Johnston: (Interposing) He didn't say that.

5730 By Mr. Steffen:

Q. That you marketed a quantity of about 80,000 feet of metallized board, is that correct? A. Altogether, we sold approximately that much.

Q. And you took a certain portion of your own production over to National, and had them metallize it? A. Yes.

Q. And the cost of metallizing it was $7 to $9 per thousand square feet, is that correct? A. Somewhere in that neighborhood.

Q. Give us the difference in cost between metallized and unmetallized board, to the dealer? A. I can't tell you. Somewhere in the neighborhood of $10, roughly.

Q. You don't mean to say that, Mr. Chism? What was the price, if you can remember, around 1937 or 1938, of ordinary board? A. Ordinary 3/8 inch board was about $23.

Q. And what was the dealer price for metallized board, of the same thickness? A. The dealer price would be somewhere around $30 to $33, in that neighborhood.

Q. For what? A. For 3/8 inch board.

Q. Plain board? A. Yes.

5731 Mr. Bromley: You mean metallized, don't you?

The Witness: Yes, that is what I mean.

5732 By Mr. Steffen:

Q. The price of metallized board in 1937 and '38 was only about $32 or $33 per thousand square feet, is that your testimony? A. Yes, that would be my recollection on it.

Q. What has been the price within the last two or three

years of metallized board, three-eighths inch in thickness? A. I don't know, we haven't been able to get any.

Q. What was the price the last time you sold any, do you recall? A. I don't recall, it would be approximately the price I mentioned.

Q. Now this board that you bought already metallized, you testified you did buy some board already metallized, didn't you? A. Yes, I am quite sure that we did.

Q. Was there any difference in the way you sold that board from the way you sold the board which you had metallized by National?

Mr. Bromley: I object to that as calling for a conclusion.

Mr. Steffen: I think he can draw that conclusion, your Honor.

Justice Stephens: Read the question.

(The reporter read the question as above recorded.)

5733 Justice Stephens: The question is very general, Mr. Steffen: Do you mean in price, or as to manner of distribution, or what?

By Mr. Steffen:

Q. I mean as to price, or were there any different instructions to your salesmen as to the board, whether it was manufactured by somebody else already metallized and sold to you, or whether you took your own board and had it metallized? Did you treat those as two separate types of transactions?

Justice Stephens: That question may stand. The objection to the question as asked is sustained on the ground that it was too broad, but the present question may stand.

The Witness: We just sold all of it at the price we were able to get for it in the field.

By Mr. Steffen:

Q. And the price that you were able to get for it in the field was the prevailing price? A. The general market price.

Q. And you got your information as to general market price how, by asking dealers? A. Through our salesmen, and through our dealer friends.

Q. And what prices would they turn in to you, in order that you could ascertain the general market price? A. Various prices.

Q. Well, in the same locality for the same type of board, various prices? A. Well, you are covering a pretty wide field with your question.

5734

Q. Well, I am asking you to limit it, if you must. A. You mean all types of board?

Q. No, I am talking about metallized board, Mr. Chism, and you said that you sold it at the prevailing prices, and I asked you how you got your prices, and you said from the dealers.

Now the next question was—was there any difference in the prices that your salesmen brought in from the dealers? A. Not from the same territory.

Q. They were always the same? A. Yes.

Q. Whether that board had been sold to a dealer by National or by USG or by any others, is that correct? A. I never made any inquiry about who sold the board in the territory.

Q. When you determined the prevailing price, was one price sufficient for your purposes in a particular territory? A. We found out what price we would have to sell that board at to the dealer, and we sold it to him.

Q. I want to know if your salesmen came in and said, "National is selling metallized board at such and such a price, in such and such a town"—if that was sufficient? A. If we found that to be the fact, it was sufficient, yes.

5735

Q. And if USG were selling in a town, that would be sufficient for your purposes, if you had their price? A. Yes, it would.

Q. And was that true with regard to your sales of perforated lath, that you regulated your sales by what your salesmen told you National or USG or Certain-teed were selling to your dealers for, or to dealers in a particular territory?

Mr. Bromley: I object to the use of the word "regulated". I don't know what it means.

Mr. Steffen: I didn't mean to use the word "regulated".

May I have that question repeated?

(The reporter read the question as above recorded.)

Justice Stephens: The word "regulated" is conclusional in character. You may rephrase the question.

By Mr. Steffen:

Q. Was it your policy, Mr. Chism, to sell at the price, for perforated lath, that your salesmen reported to you, if it were the fact, that National or Certain-teed or USG were selling at in a particular territory at a particular time? A. Whatever the general market was there, we sold at that price, yes sir.

Q. And during that period do you recall, when you started selling perforated lath, any differences reported
5736 to you as to the prices at which National or USG or Certain-teed was selling perforated lath in a given territory? A. I expect I had a good many of those told to me.

Q. Do you recall any? A. No, I don't recall any.

Q. Did you find that true as respects plain board? A. Yes, there were always some differences reported to me.

Q. And what were those differences with respect to Mr. Chism? A. With respect to prices or competitive conditions in certain markets. Most of them we found were untrue.

Q. Now back in 1927, you testified on cross-examination, you had difficulty in selling open-edge board, is that correct? A. Yes, it is.

Q. Was Certain-teed selling in the same territory at that time? A. Yes sir.

Q. Were they selling an open-edge board? A. Yes, they were.

Q. And were they good competition?

Mr. Adams: I object to that. I don't know what he means by "good competition."

Justice Stephens: Sustained.

By Mr. Steffen:

5737 Q. Were they vigorous competition? A. It is my recollection that they were all vigorous.

Q. And they were selling an open-edge board? A. Yes, they were.

Mr. Steffen: Will you repeat the question and the answer to the question, just preceding the last question and answer?

(The reporter read the question and answer as above recorded.)

By Mr. Steffen:

Q. My reference had to do with Certain-teed. I asked simply whether Certain-teed was giving you vigorous competition.

Mr. Steffen: I move to strike everything as not responsive, as to the others. Certain-teed was vigorous competition, is that correct?

The Witness: Yes.

Justice Stephens: I don't understand what we are about. What is it you are moving to strike?

Mr. Steffen: I asked him whether Certain-teed constituted vigorous competition, and he answered, saying that they were all vigorous competition, as I understand it, and I have got to go into that.

Justice Stephens: Are you moving to strike that out as non-responsive?

Mr. Steffen: That is right, your Honor.

5738 Justice Stephens: It may go out.

By Mr. Steffen:

Q. Now in 1927, 1928 and 1929, you were operating under a license agreement? A. With the exception of the early part of 1927.

Q. I say with respect to 1927, 1928 and 1929 you were operating under a license agreement at that time? A. From April 18, 1927, we were.

Q. And who else in your territory was operating under a license agreement? A. I don't know.

Q. Was USG selling in your territory? A. Yes.

Q. And was Universal selling in your territory? A. Yes, they were.

Q. And were you in vigorous competition with Universal and with USG? A. Yes, we were.

Q. Now USG and Universal and yourselves were all in a license agreement, did you know that; that is, USG had licensed you and also had licensed Universal—did you know that?

Mr. Bromley: I object to that as assuming facts not in evidence, and as being conclusional. I don't know what the phrase "all in a license agreement" means. Whatever it means, it isn't accurate.

5739 Mr. Johnston: Also, the witness said he didn't know whether the others had a license or not.

Mr. Steffen: It is in evidence, your Honor, that the United States Gypsum Company licensed Texas in 1927, and also Universal.

Justice Stephens: Well, that is true, but the objection is to the use of the phrase in your question, "all in a license agreement."

Mr. Steffen: I will withdraw that.

Justice Stephens: That may be stricken. Rephrase the question.

By Mr. Steffen:

Q. It is true, Mr. Chism, that the United States Gypsum Company had licensed your company and also Universal in the years 1927 and 1928. Was your company in vigorous competition with USG and Universal during the years 1927, 1928, and 1929? A. Yes, we were.

Q. And did you mean, when you said "vigorous competition" that you cut prices on each other? A. Not at all times.

Q. Did you at any time? A. There possibly were times, particularly compared with the signing of this first agreement.

Q. Your first agreement was signed in 1927? A. Yes, but not until April 18th.

5740 Q. I am speaking of the time after April, 1927. Were you cutting prices at that time, after April, 1927, so that you were in vigorous competition with USG and Universal? A. We had been in vigorous competition without cutting prices.

Q. That is what I wanted to know. Then, by "vigorous competition", you mean not necessarily price competition, is that right? A. That is right.

Mr. Bromley: I object to this unless counsel agrees that all his questions refer only to board, and that we are not now getting into the unpatented field of plaster and so forth.

Mr. Steffen: That is right. Your answers have to do with board, do they not?

The Witness: The questions did not so state.

By Mr. Steffen:

Q. Then when you were saying "vigorous competition", you meant that that might have to do with plaster as well? A. It could have.

Q. My questions were intended to relate to board, and during this period after April, 1927, on through 1928 and into 1929, when you testified that you were in "vigorous competition" with USG and Universal, you say that that

did not necessarily mean price competition, is that correct?

A. That is right.

5741 Q. And were you in any price competition with USG and Universal during this period, as to board? A. We were always in price competition with them.

Q. During that period? A. Yes.

Justice Stephens: We will take the afternoon recess.

(Whereupon a short recess was taken, after which the trial was resumed as follows:)

5742 By Mr. Steffen:

Q. Now this Exhibit 603, Mr. Chism, which is your letter to the United States Gypsum Company, asking for price information—do you recall that? A. Yes, I do.

Q. And how did you say that you got that price bulletin? A. Through our salesman in that territory.

Q. Was that a price bulletin that was sent out to dealers? A. I don't remember whether it was or not. It must have been, he got it from a dealer.

Q. And you say you never got a reply to this letter? A. No, I didn't.

Q. And by that, you mean you never got a written reply? A. I don't remember of ever getting any sort of a reply.

Q. Did you ever talk with Mr. Sadler or anybody from USG about this matter? A. I don't think so.

Q. Are you real sure? A. Yes, I am quite positive.

Q. Did Mr. Gloyd? A. Mr. Gloyd didn't have anything to do with those things.

Q. Did anybody from your company ever get a

5743 reply or get any information in response to this letter? A. Not to my knowledge, no.

Q. Isn't that a little odd? A. Not particularly.

Q. Doesn't USG usually answer their letters from you?

Mr. Bromley: I object to that as incompetent. I don't think that that is material or competent.

Justice Stephens: The objection is sustained. That is a speculative matter.

By Mr. Steffen:

Q. Do you ordinarily get replies to your letters to United States Gypsum Company?

Mr. Bromley: The same objection.

Justice Stephens: Well, that is limited to this witness. We will let that in. Objection overruled.

By Mr. Steffen:

Q. Do you ordinarily get replies to your letters to the United States Gypsum Company? A. I think in the majority of instances we do, yes.

Q. Can you explain why a dealer might have a metallized board license, while you might not, when you were buying and selling metallized board?

Mr. Bromley: I object to that as incompetent because assuming facts not in evidence. There hasn't been any evidence at all that a dealer had a metallized board
5744 license, or a metallized board license bulletin.

Justice Stephens: Read the question.

(The question was read by the reporter.)

Justice Stephens: Objection sustained.

Mr. Steffen: I would like to change that to price bulletin.

By Mr. Steffen:

Q. Can you explain, Mr. Chism, how it could come about that a dealer would have a United States Gypsum Company price bulletin applying to metallized gypsum board, while you would not? A. No, I wouldn't know how he had it.

Q. Did you ever ask USG for a price bulletin applying to metallized gypsum board, inasmuch as you were selling the product? A. No.

Q. Why not? A. We were not particularly interested in the metallized board at any time. We didn't want to sell it. We only sold it where it was necessary in order to get other business.

Q. I know it. Did you want to take chances on selling it at a loss? A. No, we took chances on finding the price that applied in each territory.

Q. Why wasn't the honest way to simply write to
5745 USG and simply ask them for their prices?

Mr. Bromley: I object to that as incompetent and improper—

Justice Stephens: (Interposing) The objection is sustained. The implication that it was dishonest to make inquiries in the market has no foundation.

By Mr. Steffen:

Q. Why didn't you write directly to USG and ask for prices? A. Perhaps I never thought about it until this particular case.

Q. Was it, perhaps, a little bit secret? A. I don't know; that was a good way to find out.

Q. And you didn't get any reply? A. No.

Mr. Steffen: That is all.

Justice Stephens: Any re-cross?

Mr. Bromley: No, Your Honor.

Justice Stephens: I would like to ask you one question, Mr. Chism. I understood counsel for the Government to ask you if the dealers, or your salesmen, turned in to you the prices, and I wasn't clear as to your answer. Did you mean that your dealers brought in to you, or that the dealers sent in to you, some actual price list, or that your salesmen reported to you in the usual course of their
5746 relations with you, or your dealers, what prices they were paying?

The Witness: On all types of board?

Justice Stephens: On board.

The Witness: Any kind of board?

Justice Stephens: Any kind of board.

The Witness: Yes, we have had occasions when some of our good dealer friends would send us lists of our competitors.

Justice Stephens: Thank you.

Do you want to make an examination, Mr. Adams?

Mr. Adams: One or two questions, if I may.

Justice Stephens: You may.

Mr. Bromley: I would like to ask the witness something in connection with Your Honor's question.

Justice Stephens: You may.

Recross Examination

By Mr. Bromley:

Q. Isn't it a fact that most of the instances where you got price information would come from your salesmen telling you what dealers were telling them they were currently paying in the market? A. Most of the information came that way.

Q. It would be very rare that your salesmen would bring in or send in a price list of some competitor—that would be rare, wouldn't it? A. Yes.

5747 Q. You kept yourself informed as to general market conditions by asking your salesmen what information they had gotten from dealer-customers in the field as to what the dealer-customers were being quoted by

others, or paying to others—isn't that right? A. That was the source that we depended on entirely.

Justice Stephens: Proceed, Mr. Adams.

Mr. Steffen: May I ask in what capacity Mr. Adams is questioning? I believe he had no cross-examination. Is this re-cross, or what?

Justice Stephens: In what capacity? I suppose he is representing Certain-teed.

Mr. Steffen: My question—is he entitled to examine at this time, inasmuch as he had no cross-examination?

Justice Stephens: Oh, I see what you mean.

What is it you wish to do, Mr. Adams?

Mr. Adams: I want to ask him some questions about a matter which came out during the course of his last examination by Mr. Steffen.

Justice Jackson: This is re-cross on your part?

Mr. Adams: I have not previously examined the witness.

Justice Jackson: But you want cross-examination on evidence brought out on the re-direct?

Mr. Adams: That is right.

Justice Stephens: Do you object to that, Mr. Steffen?

5748 Mr. Steffen: No, Your Honor.

Justice Stephens: You may have that leave.

Recross Examination

By Mr. Adams:

Q. You told Mr. Steffen and the Court that the closed-edge board which you made after April, 1927, was a better product than the open-edge board that you had previously been making?

Mr. Steffen: I don't think he said it was a better product, Your Honor, at all. I object to that.

By Mr. Adams:

Q. Was it a better product? A. Yes, it was.

Mr. Steffen: I object to that on the basis that "better product" calls for a conclusion. It is a different product.

Justice Stephens: That is pretty general. We will sustain the objection. Make your question specific.

By Mr. Adams:

Q. With respect to this closed-edge board, was it better received in the trade than the open-edge board? A. Yes, easier to sell, liked better, more popular.

Q. Was it cheaper to make? A. Yes, it was.

Q. Did it involve less breakage? A. Yes.

5749 Q. And for those reasons, and others, it was better received by the trade; is that right? A. Yes, it was.

Q. Now, you were familiar with the open-edge board that was in competition with you, which was sold by Certain-teed, weren't you? A. Yes, quite familiar.

Q. And can you compare these two boards, with respect to the matters that I have mentioned? This closed-edge board was a better product than the Certain-teed open-edge board, wasn't it? A. Yes.

Q. And didn't the trade, after you began to sell the closed-edge board, prefer the closed-edge board that you sold, to the open-edge board which was being sold in that territory by Certain-teed? A. Yes, they did prefer it.

Q. And you began to take business away from Certain-teed, didn't you? A. We first commenced to regain what we had lost.

Q. You mean what you had lost as a result of making open-edge board yourself in competition with somebody else's closed-edge board? A. That is right.

5750 Q. And you first began to regain that; and then did your business begin to cut in on Certain-teed's business on open-edge? A. I presume that is true. Our volume increased.

Justice Stephens: Any further re-direct?

Mr. Steffen: No, Your Honor.

Justice Stephens: May this witness be excused?

Mr. Bromley: Yes, Your Honor.

Mr. Steffen: Yes, Your Honor.

Justice Stephens: You may be excused, Mr. Chism. Thank you for coming here.

The Witness: Thank you.

(Witness excused.)

Mr. Johnston: I wanted to ask if the Court wanted us to furnish extra samples of the board that were identified? We can do that.

Justice Stephens: I didn't quite understand you, I am sorry.

Mr. Johnston: I wanted to inquire if the Court wanted us to furnish additional samples of those boards that were identified but not introduced?

Justice Stephens: I would like to have them. I would like to have a complete file of each of the exhibits.

Mr. Johnston: Of course, they may not be introduced. I asked Mr. Steffen, and he said he had not introduced them, but he didn't tell me whether he was going to or not.

5751 Justice Stephens: I assume he will eventually introduce them.

5752 Mr. Johnston: One other thing, Mr. Steffen, do you want us to secure and send in samples of that tape?

Mr. Steffen: I think we requested your patented markings over a period of years, yes.

Mr. Johnston: Yes, you did, but we didn't have them here today. We will send them in.

Justice Stephens: Very well, and also send some additional ones for the Court's files.

Mr. Johnston: Yes, your Honor, we will.

Justice Stephens: Mr. Bromley, this might be an appropriate time to raise your question with respect to Mr. Dowd.

Mr. Bromley: May it please the Court, my point is that it seems to me that the Government, in fairness, should tell us now what they propose to show to connect this exhibit with the defendants—

Justice Stephens: (Interposing) So that the record may show it, you are talking about Exhibit 233, I assume?

Mr. Bromley: Yes, that memorandum by Redfield with respect to some other patent.

The opinion of the Court, beginning at the bottom of page 5890—

Justice Stephens: (Interposing) Let me get that now.

Mr. Bromley: It starts at line 24, page 5890.

Justice Stephens: Proceed.

Mr. Bromley: There your Honor reviewed my

5753 objection on the ground of immateriality, and then over the page, beginning at line 2 of page 5891, you said:

"The binding effect of the document on Certain-teed is difficult to see since it is not a statement by Certain-teed itself, but by its attorney. There is no present showing that his views were or became the company's views. Even as an admission of Certain-teed the document is not yet shown to be in furtherance or execution of any conspiracy so as to bind the other defendants. These elements may, however, be supplied by later evidence, and the document could be received subject to connection in these two respects."

I see no use taking up a lot of time and having Mr. Dowd here, and taking his testimony, and arguing the question of competency, when I believe it to be the fact and that the Government will admit it to be the fact, that it has no evidence, and does not intend or hope to present any, that the views of Redfield were or became the company's views, and I think before we embark on a time-consuming effort to establish the competency of the document, we have the rule of evidence applied that this document, and indeed others which are being received subject to connection, should not be received at all unless we have a promise, made on the professional integrity of Government counsel, that it is their present intention to connect it up, connect the document up, by some other evidence, and not leave us hanging in the air with no position taken by
5754 them as to whether that is what they intend to do, or not.

Now I understand the rule to be perfectly plain that if I state to the Court I want to offer evidence subject to connection, it is my duty as a lawyer to assure the Court that I have such connecting evidence, and intend to produce it, and if I don't do that, I don't think that evidence should be received subject to connection.

Justice Stephens: I have taken it for granted that all offers of evidence subject to connection contained an implied promise that it would be connected, an implied representation that the Government did have some means of connecting the proffered evidence.

Mr. Bromley: We, on the defense, know that Redfield's views did not become the company's views, nor were they ever the company's views; that he went off on an expedition of his own and wrote something about a patent which had no significance at that time, and has had none at any time since then.

My point is that before we call Dowd here, and examine and cross-examine him, we should have this assurance from the Government. I don't believe they can make it.

Mr. Adams: I have one further thought that I would like to add, and that is that it is my recollection from this exhibit, as originally produced in the courtroom at the time C. O. Brown was on the stand, that it, on its
5755 face, purports to be addressed to him. He was the officer of the company to whom it was addressed. He, however, was unable to identify the memorandum in any way, and your Honors will recall that we therefore

passed the question of privilege until Redfield was brought here to identify it.

I mention that because it seems to lend support to Mr. Bromley's views, which certainly are mine, that since C. O. Brown, the officer to whom the memorandum was addressed, could not even identify it, that we are now entitled to some definite assurance on the part of the Government that they have evidence somewhere that will connect the exhibit with Certain-teed's knowledge. We say we don't know of any such evidence.

Justice Stephens: Do you wish to be heard, Mr. Steffen, or Mr. Knuff?

Mr. Steffen: Yes, your Honor.

Justice Stephens: Proceed.

Mr. Steffen: I am not prepared to give your Honors full assurance at this time that we have the evidence that Mr. Bromley insists that we should have. I want to say upon that, however, that was offered in perfectly good faith at the time, and of course at the time we expected that Mr. C. O. Brown, at the time the document was presented to him, would know something about it.

I am not at all sure—and I would like to check this
5756 more carefully—that there must be a showing that Mr. Redfield's views, as Mr. Bromley phrased it, became the views of the company.

Mr. Bromley: That was the Court's statement, not mine.

Mr. Steffen: Well, I haven't read the Court's statement in that respect.

Justice Stephens: That was our ruling. We said at the bottom of page 5890, and the top of page 5891:

"Mr. Bromley objected that proposed Exhibit No. 233 is irrelevant and immaterial because not shown to be in furtherance or execution of any conspiracy charged in the complaint. The binding effect of the document on Certain-teed is difficult to see since it is not a statement by Certain-teed itself, but by its attorney. There is no present showing that his views were or became the company's views. Even as an admission of Certain-teed the document is not yet shown to be in furtherance or execution of any conspiracy so as to bind the other defendants. These elements may, however, be supplied by later evidence, and the document could be received subject to connection in these two respects."

We of course have assumed that you expected to connect it. We worked out our views on this subject very carefully, as I said yesterday, and I think they are correct, and it does seem a reasonable request, in view of the expense of bringing Dowd here, and possibly also bringing
5757 Redfield back here, that the Government make some assurance that it does expect to be able to connect, or has some evidence in mind which will connect, the exhibit so as to make it binding, first against Certain-teed, and second against other defendants.

5758 Mr. Steffen: I take it that there are two grounds of admissibility, one as a declaration on the part of an alleged co-conspirator—and in order to do that we would have to show that it was a declaration by an authorized person, I presume. That was the purport of your Honor's ruling, was it not?

Justice Stephens: I don't think I could make the ruling much clearer than I have.

This Exhibit 233 was a letter from Redfield to C. O. Brown, which had to do with some Speer Patent, as I remember.

Mr. Steffen: That is right.

Justice Stephens: And it had some statements in it to the effect that the Speer Patent might possibly be used to bolster up a price-fixing arrangement, or for its nuisance value, or words to that effect.

Now that was the statement of Redfield, and you are offering it as a declaration of Certain-teed. Now it must, in some manner, be made to be the statement of Certain-teed, by some adoption or action which would make it operative, legally, as an admission of Certain-teed. If it became an admission of Certain-teed, then it could come into evidence against Certain-teed. Then after that, it must be shown to be in furtherance or execution of the conspiracy, to be binding upon other defendants.

Perhaps you would like to think this over until
5759 tomorrow morning and see if you can collect your ideas as to this additional evidence that may be necessary.

Mr. Steffen: We will have to check through to see what additional sources we have, and what standard we have to meet. I have not, as I say, read your Honor's opinion in the matter.

Justice Stephens: You may take the time to do that. We think the request is reasonable, however. Neither the

time of the Court nor counsel, either for the Government or the defendants, nor the time of witnesses, nor the expense involved, should be used or incurred unless there is some reasonable likelihood of the exhibits being connected.

Who is the next witness?

Mr. Steffen: Mr. Tice.

Justice Stephens: Come forward, Mr. Tice.

Thereupon, HARRY H. TICE a witness called for and on behalf of the United States, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Steffen:

Q. Will you state your full name, Mr. Tice? A. Harry H. Tice.

Q. Where are you located? A. South Gate, California.

Justice Jackson: How do you spell your name?

The Witness: T-i-c-e.

5760 By Mr. Steffen:

Q. And what company are you associated with? A. Schumacher Wall Board Corporation.

Q. The Schumacher Wall Board Corporation is located at South Gate, California? A. That is correct.

Justice Stephens: That is just outside Los Angeles, is it not?

The Witness: Yes.

By Mr. Steffen:

Q. How long have you been associated with that company, Mr. Tice? A. Since July, 1926.

Q. How long has that company been in existence? A. The present Schumacher Wall Board Corporation has been in existence since July 6, 1926.

Q. And was there a predecessor of this company under the name of Schumacher? A. Yes, the predecessor organizations went back to 1913.

Q. Operating at the same place, South Gate? A. No, they operated in Los Angeles. Our plant was recently moved, in the last three years.

Q. On what date, do you remember? A. May, 1940.

5761 Q. You rebuilt your plant at that time? A. Yes.

Q. What does the Schumacher Wall Board Corporation manufacture, Mr. Tice? A. It manufactures gypsum wallboard, gypsum lath and gypsum roof plank.

Q. Do you manufacture plaster? A. No.

Q. Where does your company get its source of supply of gypsum? A. Near Las Vegas, Nevada.

Q. And what process takes place there? A. We only mine the gypsum and load it on the cars.

Q. And then it is shipped to South Gate? A. That is correct.

Justice Stephens: If you can lift your voice a little, we would appreciate it. We have a little difficulty hearing you.

The Witness: All right.

Mr. Steffen: Mr. Tice has a cold, and it is a little awkward for him to talk in a loud voice.

By Mr. Steffen:

Q. What sales territory does your company cover, Mr. Tice? A. Practically all of the Pacific Coast States,
5762 including California, Arizona, Nevada, Idaho, Utah, Oregon and Washington.

Q. Roughly, how many board feet did you manufacture last year?

Mr. Bromley: I object to that as immaterial.

Justice Stephens: What is the purpose of that?

Mr. Steffen: Simply to develop the scope of the business.

Mr. Bromley: It has no materiality. This man operates west of the Rockies; he is not a defendant or a co-conspirator.

Justice Stephens: Well, if it is preliminary to giving us an understanding of the witness' business, so as to make other testimony understandable, it may come in as preliminary only. We don't see the materiality of it now.

Mr. Steffen: That is the purpose of the question, your Honor.

By Mr. Steffen:

Q. Roughly, how much board and lath does your company manufacture per year? A. Over 100,000,000 square feet.

Q. And does your company make a perforated lath? A. Yes.

Mr. Bromley: I object to that as immaterial and move to strike the answer.

Justice Stephens: Is that on the ground that the conspiracy charged relates to the Eastern Area?

5763 Mr. Bromley: Yes, your Honor.

Justice Stephens: What do you say to that, Mr.

Steffen? What do you intend to prove by this witness?

Mr. Steffen: Well, that raises rather a broad question as to what we intend to prove. As has been developed by the evidence so far, Mr. Tice is outside of the Eastern Area.

We allege in the complaint that the conspiracy which is being established here, or the monopoly, took place within the area East of the Rocky Mountains.

We have had questions raised concerning the manufacture of board and the manufacture of perforated lath in the East.

Mr. Chism testified, for example, concerning the manufacture of board, closed-edge board, in his territory, and of the need to manufacture closed-edge board, using that as one example, in order that his company might survive.

There is also the question of whether the perforated lath of the sort manufactured under the USG Patent, No. 1,938,354, which is the Roos Patent, is a necessary form—let me get at it the other way around.

We consider that in the case there are at least two issues having to do with perforated lath. One will have to do with the general scope of patent No. 1,938,354, and when I bring that out I am bringing out an entirely new subject.

The other will have to do with whether Patent No. 1,938,354, the Roos Patent, completely covers the
5764 product, or the manufacture of perforated lath.

Now I think I should amplify the second, particularly, because it is a very important item of evidence in the Government's case.

Under the General Electric case, which is the decision upon which the defendants rely, it was stated by Chief Justice Taft at that time that the three patents which were in issue there completely covered the manufacture of tungsten filament lamps.

The Court proceeded upon the assumption, in fact it was stipulated by the Government in the case in a stipulation of facts, the case was tried upon a stipulation of facts, it was stipulated by the Government in that case that those patents, if not completely covering, at least were absolutely necessary to the manufacture of tungsten filament lamps in this country, in other words, that the Westinghouse Company would not have been able to manufacture and continue in business in the bulb business, unless they had the General Electric patents, or had the right to manufacture under the General Electric patents.

Now that, as I say, was assumed in that case. There was no evidence presented by the Government or anyone else indicating that there would be another type or a possible other type of tungsten filament bulb, and accordingly the case went off on a ground which we distinctly
5765 do not consider to be conceded in this case—

In other words, in this case we have consistently stated that we raise the question that whether or not the defendants' patents, all of them or any one of them, can be said to completely cover the product which they manufacture, in the fashion which was required in the General Electric case—

Justice Stephens: Will you explain a little more what you mean by "completely cover"?

Mr. Steffen: I don't have with me 272 U. S. 476, which is the General Electric citation, but we have sent for it. When I get it, I can give you the argument, because it is, as I say, a very important argument in our present case.

In that case, as I understand it, the Court and the parties assumed that the patents in question—and there were three of them—one on the filament, one on the means or method of excluding the air, and I have forgotten the third—but the three patents were held to completely cover the making of tungsten filament lamps. No one could make them, there was no possible lamp business left for the Westinghouse Company unless they had the patents which completely covered the making of tungsten filament lamps, or had the right to manufacture under those patents.

Justice Jackson: Well, a company could take a chance and manufacture them, couldn't they?

Mr. Steffen: Then they probably would get slapped down.

5766 Justice Jackson: Suppose they weren't sued by Westinghouse.

The Witness: There was a provision that the General Electric would protect their patents.

So that the case went off on—

Justice Stephens: I don't yet understand the use of your phrase, "completely cover".

Do you mean to indicate that in the General Electric case it was stipulated or assumed that it was impossible to manufacture any tungsten filament bulb except by the use of these patents, unless in an infringing manner?

Mr. Steffen: That is right, that is if anyone were to attempt to make a tungsten filament lamp, which was the type that superseded the old carbon filament lamp, which

had gone by the board, and the tungsten filament lamp, as everyone knows, had become practically the only type of lamp that could be manufactured and sold—on that assumed set of facts, that the tungsten filament lamp patents completely covered—and I will read the language of Chief Justice Taft, at page 481, where the Court said: "These three patents cover completely the making of the modern electric lights, with the tungsten filaments," and so forth.

Then if you will carry over to the second branch of the case, beginning on page 488, where the Court takes up the question of the license agreements to Westinghouse, the first branch had to do with the agency sales arrange-
5767 ments between General Electric and its own agents. The second phase had to do with the licensing agreement between General Electric and the Westinghouse people.

There the Court said:

"Had the Electric Company, as the owner of the patents entirely controlling the manufacture, use and sale of the tungsten incandescent lamps, in its license to the Westinghouse Company, the right to impose the condition that its sales should be at prices fixed by the licensor and subject to change according to its discretion?"

Now those two statements, appearing in the Court's opinion, were greatly amplified if you will read the briefs and the opinion of the lower court, and the stipulation of the parties with respect to the facts of the case, and the argument apparently proceeded very largely on the assumption that the Government had said that the only possibility of the Westinghouse Company continuing business in this case, that is continuing in the lamp or bulb business, was that they have the use of these particular tungsten filament lamp patents, for that period, and that they would have to go out of business completely unless they were to have the use of those particular patents.

Now, I point out that in this case there has certainly been no such concession on the part of the Government, and there is nothing in the pleadings which indicates,
5768 in any way, that these patents are the only and the necessary patents to the manufacture of board, or to the manufacture of lath; that they, on the other hand, are—what I am trying to say is that there is an issue in the case, therefore, which the defendants, as we have asserted in our trial brief, and I think the defendants have

not denied it at any time—have an obligation as an affirmative defense to establish, once we have shown price fixing and a general control of the business, as we have in this case, that they have valid patents—your Honors will permit them the assumption that their patents are valid—that those patents completely cover the manufacture of board and that it would not be possible, in other words, to use the exact comparison, not be possible for other companies to manufacture a gypsum board and continue in business without the use of the USG patents under which they have licensed the licensees in this case.

Now we have made, in our trial brief, at least two point on that, or two arguments on that point.

In one we say that the makeup of the board is a matter of gypsum, paper, and one or two other ingredients that go into the manufacture of the board; that at most, a close analysis of the defendant's patents, as for example the patent on perforated lath, will show it to be a patent not completely covering the sale of the ingredients, the sale of
the paper, but it is a matter of simply some holes
5769 in the board, it at most is an improvement in a
board which had been manufactured for years, and a relatively, as we see it, unimportant improvement.

That follows through with their other patents.

But let's stay for a moment with the perforated lath patent.

If we can show—and this is our thesis here—that Patent No. 1,938,354, which is the perforated lath patent, is just one of a number of other ways of making board, perforated board, which will answer the same requirements as the board manufactured under the Roos Patent No. 1,938,354, we establish, as I see it, that the defendants have no defense, or in other words, that price-fixing based upon a patent which does not completely cover the manufacture of perforated lath, affords them no justification for price-fixing or for all of the other means of control that they have worked out in this case.

Now I want to say this, in order to make my position quite clear on the matter. That evidence, we think, is admissible in one respect as showing subterfuge on the part of the defendants, as respects the perforated lath, those companies which said, "Let's make a perforated lath, and let's figure a price of 25 cents by way of advance."

We say that as respects those companies picking out a patent which was not a necessary patent, and which cer-

tainly today is not a necessary patent, that they
5770 were attempting to fix prices and control the distribution of board upon or under a patent, which, by no stretch of the imagination, can completely cover the manufacture of perforated lath within the description of the General Electric case.

We feel that the defendants must stand upon the description, or rather the ruling of the Court, in the General Electric case, because no court, to our knowledge, has gone farther than that.

Justice Jackson: Does the Roos Patent purport to give the patentee a monopoly on all perforated lath, or just on a certain kind of perforated lath, that kind set out in the specifications and claims of the patent?

Mr. Steffen: It purports, your Honor—and this is a question that we are going to have to take up—simply to cover, as I think we will show when it is construed, a very narrow type of patent. We are not attacking the validity—

Justice Jackson: (Interposing) It is just a kind of perforated lath?

Mr. Steffen: Just a very limited kind of perforated lath.

Our first argument, therefore, and I think the first ground upon which the present evidence will be admissible, is that the fact is that there are other forms of perforated lath. We have already introduced the fact that the National people make a different lath than did the United States Gypsum Company under its patents.

5771 Justice Jackson: Are there any patents for any other perforated lath, besides the Roos Patent?

Mr. Steffen: There are a lot of them, your Honor, and we will introduce in evidence—

Justice Jackson: (Interposing) Each of them is a separate patent for a certain kind of perforated lath, set out in the patent?

Mr. Steffen: That is right. But what it comes down to, your Honor, is that there is no basic patent in the field, in the perforated lath field, today, that in any manner compares with the basic patents in the General Electric case.

Therefore, our first offer of this evidence would be, as I say, to show subterfuge, or to show that the defendants went into a very thin patent situation, and because it was thin, did so probably with the idea of obtaining patent control. That is a matter of argument upon inference.

Now the second point that we make—

Justice Stephens: (Interposing) Before you go to the second point, I am sorry but I still am unable to define in my own mind just what you mean by your "subterfuge" charge. Do you mean now in this aspect of it the charge that the defendants did not think that the Roos Patent was necessary for the manufacture of the board manufactured under the Roos Patent?

Mr. Steffen: My answer, your Honor, is that to
5772 the extent that they thought that the Roos Patent, No. 1,938,354, was very thin, and it was therefore a medium largely to fix prices and gain this 25-cent differential, rather than because they were primarily interested in making this as the only possible perforated lath that they could make, within the terms of the General Electric case, that that would go to the showing that they entered into it for a purpose which the Sherman Act would contend—

Justice Stephens: That seems to be an entirely different question. That is the reason I asked you. I had thought that perhaps your charge of subterfuge was a charge that was intended as a charge that the defendants didn't really have any belief in the validity of their patents, and that therefore they were not acting in good faith. But isn't that a different thing from what you are now talking about as to the coverage of the patents?

Mr. Steffen: Well, I think there are different ideas on that, but if the patent isn't a broad patent, or as your Honor is speaking there, if it isn't a valid patent, either idea reaches the same result—

Justice Stephens: (Interposing) I didn't raise the question as to its validity. I raised the question which I thought you were charging as to the defendants' belief in its validity. You have introduced some letters here which you have indicated will be connected, as tending to in-
5773 dicate that the defendants had advice from their lawyers that they didn't really think that these patents were valid. I thought perhaps that was part of your subterfuge charge. But that seems to be entirely different from what you are now talking about as to the applicability of the General Electric case, where your contention, as I now understand it, is that in order to have a price-fixing system validly based upon the General Electric theory, you must have patents which cover all possible ways of manufacturing the article upon which the price is fixed. That seems to be a different contention. Perhaps I am not yet fully informed about it.

Mr. Steffen: Before this is closed, I would like to explain it very thoroughly.

Justice Stephens: We will hear you further, of course, but for the moment, so that we can get something before our minds to think about during the recess, what do you intend to prove by this witness under your theory about the coverage?

Mr. Steffen: What I intend to establish by this witness' testimony—I don't wish to be bound in detail by this, because I will probably go further—I want to show that his company has manufactured perforated lath out on the Pacific Coast since 1926, and that prior to that time there was perforated lath manufactured out there, and I would like to show at least the Makowski Patent which was issued in 1920, long before Mr. Roos got his patent,
5774 which was issued in 1935 or thereabouts, 1933 or 1935.

I want to show, furthermore, that the perforated board made by the Schumacher Company does sell in competition with the board of the United States Gypsum Company, sold in that same territory, which would indicate that it is perfectly possible to sell that perforated board under competitive conditions with the United States Gypsum Company.

I want to show further that the board which Schumacher people manufacture does pass the one-hour fire test, which is the principal argument which has been advanced for the Roos Patent perforated board.

When I have established that, I think I have shown that the Roos Patent is no basis whatever under the doctrine of the General Electric case, for price-fixing, and price control.

I want to call your Honor's attention in that connection to the fact that the Roos Patent was licensed on a 10-cent royalty basis for a period of about two years, in 1937 and 1938, and that thereafter, the United States Gypsum Company offered gratuitous licenses to the various companies which were its licensees, practically withdrawing it, but in their gratuitous license, they wrote the provision that it would become subject to all the terms and conditions of the general agreements of October or November, 1929.

Now those general agreements of course, are the
5775 ones that we are most interested in here because they provide for price fixing.

In other words, the perforated lath patent is now part of the general back-log of patents upon which the defen-

dants are going to justify their price fixing, and it is our purpose to show that that particular patent at the present doesn't permit such a defense.

Justice Stephens: We will have to suspend at this time—

Mr. Bromley: (Interposing) I would like to say just one word, your Honor.

Justice Stephens: You may do so.

Mr. Bromley: It seems to me that Mr. Steffen's interpretation of the General Electric case is a very novel one, and one never heretofore suggested by anybody.

It results in this: If at the time these General Electric tungsten patents were taken out, somebody else had a way, or a patent to make a light by using aluminum instead of tungsten, then the fellow that had the tungsten patent couldn't fix prices on tungsten because there was another bulb in the field using aluminum instead of tungsten.

Nobody has ever heretofore suggested any such limitation on price fixing as that. That would mean that if I got a patent on a radio today, which is a valuable, novel, fundamental patent, the fact that Mr. Armstrong had a patent on a frequency modulation system would mean that
5776 I couldn't fix the price of my invention.

Nobody has ever said that before, nobody has ever suggested that before; and I don't believe the Supreme Court in its opinion in the General Electric case ever meant to intimate such a thing. All it was saying was that these patents are product patents that cover the light. Of course the patents didn't cover the glass or the screw, or the thread on the base, or the base. They just covered a particular kind of a lamp which had tungsten in it, and from which the air had been pumped out and gas put in.

Now the carbon light was still in existence and still could be used and still was manufactured—not as good, but it could be manufactured.

The very next day I might have discovered a new way, without the use of tungsten, to make an incandescent lamp, and I might have gotten a patent on it. Would that mean that the General Electric system must fall, that their price-fixing system must fall? There is no such intimation in the opinion whatsoever.

Justice Stephens: Well, thank you for your statement of your views, Mr. Bromley. We will consider the matter, and will now adjourn until tomorrow at ten o'clock.

(Whereupon, a recess was taken at 4:04 o'clock p. m. until 10:00 o'clock a. m. of the following day.)

5777 IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA,

Plaintiff,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; EBOR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS,

Defendants.

Seventh Floor,
Internal Revenue Building,
Washington, D. C.,
Thursday, March 30, 1944.

The above-entitled cause came on for further hearing at 10:00 o'clock a. m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

APPEARANCES:

(Same as heretofore noted.)

5785 Now last night, we were hearing briefly from Mr. Bromley. Do you wish to be heard further, Mr. Bromley, with respect to the admissibility of the offered evidence of the Witness Tice?

Mr. Bromley: No, I think not, Your Honor.

Justice Stephens: What was the last question asked of this witness? Let's see what is before the Court.

Mr. Bromley: On page 6053, line 20, this question was asked:

"Q. And does your company make a perforated lath?" to which the witness answered:

"A. Yes."

That question was then objected to by me, on the ground that it was immaterial, and I moved to strike the answer.

Justice Stephens: Will counsel also refresh the recollection of the Court as to that part of the record in which Mr. Chism was asked the question whether or not USG had ever brought an infringement suit against Texas,
5786 and we, I think, ruled that out. I would like to see that part of the record.

Mr. Bromley: I think that question was withdrawn.

Justice Stephens: I think we expressed ourselves, nevertheless, on the subject, and I would like to see what we stated.

Mr. Bromley: Page 5983, the question was withdrawn just in time.

Mr. Steffen: What do you mean by "just in time", Mr. Bromley? (Laughter).

Justice Stephens: Yes, I remember now. The Court was in the process of considering whether that evidence was admissible or not.

Well, now, Mr. Steffen, I have re-read, myself, since the adjournment last night, the General Electric case, and my colleagues have given consideration to it, also; and I think I reflect their views when I say that we are not able, at the present time, to put the construction upon that case that you do,—that it rules, as I understand your contention, that there can be no valid or proper price fixing under a patent unless it is a basic, all-covering patent. But that aspect of the discourse yesterday seemed to me irrelevant, anyway, to the contention you were making; and I am still in doubt, myself, as to the admissibility of this evidence, offered through Mr. Tice, to prove that he was making and selling some sort of perforated board,
5787 in large quantities, outside of the Eastern area. I am still unable, myself, to see the relevance of it, unless upon some possible theory that if the defendants had faith in their perforated lath patent, under which they were manufacturing, they would have brought infringement suits against similar lath manufactured without benefit of license.

There is a charge in paragraph 46 of the complaint that the licenses were not bona fide, were not entered into bona fide, but merely as a cloak for price fixing. I am still, even on that theory, somewhat in doubt, and I would like to hear you a little further, if you care to be heard—and I think my colleagues would like to hear you a little further—on the materiality and relevancy, under the issues of the case, of the Tice testimony.

Mr. Steffen: I first would like to enter a caveat with respect to the Court's statement concerning the necessity of having a basic patent as a basis for price fixing. That, I take it, we will argue at more length later on, because it is going to be necessary to look at these patents rather carefully to determine whether they are of the significance of the patents which were before the Court in the General Electric case. In other words, as we see the matter, the defendants have pleaded—the United States Gypsum Company has pleaded in its answer, paragraph 35, that everything they have done in this case was done under
5788 the protection of Supreme Court decisions, and thereby they, I think, plead that they are within the terms of the General Electric case, inasmuch as the General Electric case is the leading authority upon price fixing agreements based upon patent licenses—

Justice Stephens: (Interposing) Of course, we will not foreclose you from arguing what you think the General Electric case means, at the close of the Government's case, or at the close of the case as a whole, whatever time is appropriate. At the same time, we are bound to rule upon the admissibility of evidence, so far as we can, as the evidence is offered. Of course, there are sometimes questions as to the admissibility of evidence which are controlled by questions of substantive law, which are the main questions in the case, and under those circumstances the practice of the courts is usually to hear the offered evidence, subject to an ultimate ruling on the question of substantive law, which controls both the merits of the case and the admissibility of evidence. But I am not able to see, Mr. Steffen, yet, the relevance of the Tice evidence to your theory of the meaning of the General Electric case. That is to say, even if we accept, for the time being, your contention that the General Electric case means to forbid all licensing and price fixing under patents unless the patents are what you refer to as covering patents, still I don't see what the Tice testimony tends to prove under that theory of
5789 law.

Can the fact that Mr. Tice manufactured many hundreds of thousands or millions of square feet of perforated board, can that mere fact prove that the patents on perforated lath, which were the subject or the foundation of the license agreements in this case, were not basic or covering patents? I should think that would have to be proved not by the adventitious fact that somebody is manufacturing a lot of board, but by a patent expert.

Mr. Steffen: By the introduction of the patents?

Justice Stephens: Yes, by introduction of the patents, or testimony as to the nature of the patents in connection with the art.

Mr. Steffen: I think Your Honor is correct on that, that complete proof would certainly require the introduction of the patents in question, and in this case the Makowski patent, if a patent is necessary at all.

I will call your attention to the fact that the Schumacher people have held the Makowski patent since they started in business, and that it is probably the patent under which they operate, or were operating in the years from 1920 to 1937, that antedating by many years the Roos patent.

I want to say, next, that National, and some of the other defendants here, have made board, perforated lath, I mean,
without benefit of any patent. So that you have the
5790 situation of three types of perforated lath on the
market, that is, there are three sources of supply or sources of authority for perforated lath. You have the lath made by the Schumacher people, which may or may not be under the Makowski patent, but which I think can be shown to be; you have the National lath, made by the National Gypsum Company; and you have the lath purporting to be made under the Roos patent No. 1,938,354, which USG licensed to certain of the defendant companies.

Now, getting to the relevancy of this question—which, after all, as Your Honor points out, is the issue before us—we consider that in determining the question of good faith and the question of subterfuge of the companies which took out license agreements from USG under the perforated lath patent, it is important to determine what other available sources of perforated lath they could have had; and we wish to show, as we have already shown in the case of National, that they could make it without any patent.

We now want to show that on the Pacific Coast, the Schumacher people were manufacturing and had manufac-

tured a perforated lath for a great many years; and to show, moreover, that that lath passed the one-hour fire test of the Bureau of Standards.

Now with that shown we can build an argument, as we see it, that the defendants, in taking their licenses
5791 under Patent No. 1,938,354, which is the Roos patent, were more, or fully as much interested in getting the price control that went with 1,938,354, as they were in getting the patent which the license covered.

That, in narrow compass, is the basis of our argument.

(The Justices conferred.)

Justice Stephens: Well, the Court will hear the testimony. The objection to the question is overruled; and the motion to strike the answer is denied.

Mr. Steffen: Mr. Tice, will you take the stand, please?

Thereupon, HARRY H. TICE the witness on the stand at the time of adjournment, resumed his testimony as follows:

Direct Examination (resumed)

Justice Stephens: The Court is receiving the evidence, I should add, under the charge of subterfuge. The Court does not see, at the moment, the relevance of the evidence to the question of substantive law, which is raised as to the meaning of the General Electric case.

By Mr. Steffen:

Q. Mr. Tice, I asked you yesterday the question whether your company made a perforated lath, and I believe you answered "Yes".

When did your company start making perforated lath?

5792 Mr. Bromley: May it be understood that I have an objection, on the same grounds as heretofore expressed, to all of this testimony?

Justice Stephens: Yes, that may be shown, and that the Court overrules it, so that your record is protected.

Mr. Bromley: With respect to this specific question, I object to it as incompetent unless counsel indicates what he means by a perforated lath.

Mr. Steffen: I will go into the type of perforated lath.

Mr. Bromley: Well, I object to this question as being too general.

Justice Stephens: That objection is sustained. We ought to have this made pretty definite, if it is going to have

any bearing upon the very issue of subterfuge which you choose to relate it to; so ask him to describe the type of lath which he made, in some detail, if he can.

By Mr. Steffen:

Q. You have answered that you do make a perforated lath? A. Yes.

Q. When you started making perforated lath, what type of lath did you make? A. We made a 3/8 inch, open-edge lath, 24 x 32 inches, with perforations 3/8 of an inch
5793 in diameter, spaced approximately 3-1/2 to 4 inches horizontally on the board, and 2 to 2-1/2 inches perpendicularly on the board.

Q. And what date was this? A. That is when the Shumacher Wall Board Corporation was organized, in 1926.

Q. Now in order to get that clear, do I understand that the size of the perforations in your lath was 3/8 of an inch in diameter? A. That is correct.

Q. And the perforations were in parallel rows to the side of the board, were they—

Mr. Bromley: (Interposing) I object to this as leading and repetitious. He has had the description.

Mr. Steffen: I want to make sure that we understand the description.

Justice Stephens: Well, this witness is testifying under difficulties, due to his cold. However, it is not desirable to repeat the same question in the record twice.

Why don't you have the Court Reporter read his answer.

Mr. Steffen: I got his answer, Your Honor. It is a long, detailed answer, and I thought it might be made clearer if we were to break it down.

Justice Stephens: I am sorry. I thought you said you didn't understand it.

Mr. Steffen: No.

5794 Justice Stephens: Will you read his answer?

(The answer was read by the reporter as follows:

"A. We made a 3/8 inch, open-edge lath, 24 x 32 inches, with perforations 3/8 of an inch in diameter, spaced approximately 3-1/2 to 4 inches horizontally on the board, and 2 to 2-1/2 inches perpendicularly on the board.")

By Mr. Steffen:

Q. Perhaps I had better ask what you mean by the latter part?

Justice Jackson: Why don't you ask him whether or not they were staggered or in a straight line?

Mr. Steffen: That would be a way of getting at it.

By Mr. Steffen:

Q. Were they staggered or in a straight line? A. They were staggered.

Q. What was the distance between your vertical rows?

Mr. Bromley: I object to that as repetitious. He stated that.

Justice Stephens: He may answer.

The Witness: From 2 to 2-1/2 inches.

By Mr. Steffen:

Q. How close were the vertical rows to the outside edge of the board? A. That varied. Sometimes they were
5795 one inch, and sometimes an inch and a half.

Q. Could you state whether they were parallel with the edge of the board, the vertical rows?

Justice Jackson: Do you mean did they comprise a parallel line?

Mr. Steffen: Was the vertical row of perforations parallel with the edge of the board?

The Witness: No, they were staggered.

By Mr. Steffen:

Q. No, I am speaking of the outside line. A. They still were not parallel, because every other row of holes was staggered from the other row, to form an irregular line.

Q. And did you subsequently change the size of the hole, or the perforation? A. Will you repeat that?

Q. Did you at any time change the size of the perforation? A. Yes.

Q. What size did you change it to?

Mr. Bromley: When, please?

Mr. Steffen: I will find that out.

The Witness: What size did we change it to?

By Mr. Steffen:

5796 Q. Yes. A. We changed it to several different sizes. Commencing in 1936, we manufactured lath with 9/16 inch perforations, and 5/8 inch perforations; 11/16 inch perforations; 3/4 inch perforations; and 13/16 inch perforations.

Q. And this was during what period of time? A. From 1936 to 1938.

Q. I show you what has been marked as Government's Exhibit 54 for Identification, and ask if you can identify it?

(The article referred to was marked as Government's Exhibit No. 54 for Identification.)

(Government's Exhibit No. 54 for Identification was handed to the witness.)

By Mr. Steffen:

Q. Is that a piece of your manufacture? A. Yes, sir.

Q. When was that made? A. When was this made?

Q. Yes. A. Probably very recently. I am not sure of the date.

Q. Is that a piece of perforated lath? A. It is.

Q. And what are the spacings of the holes in that
5797 exhibit? A. Well, these are spaced 3-5/8 inches on centers horizontally; and in the perpendicular rows, one spacing is 4-1/4 inches and the next set of spacings is 3-3/4 inches, and it continues that way throughout the length of the board, with alternate spacings of 4-1/4 and 3-3/4 inches.

Q. And how close to the edge of the board does the closest line of holes come? A. One and one-half inches.

Q. Is that true at each end of the board? A. Yes, that is true at the ends.

Q. How long have you been making board according to the type of Exhibit 54? A. Since early in 1938.

Q. Do you know whether your board passes the one-hour fire test?

Mr. Bromley: I object to that as incompetent because calling for a conclusion.

By Mr. Steffen:

Q. Did you ever submit samples of your lath to the Bureau of Standards? A. Yes.

Q. And will you state what samples you submitted to them? A. We submitted above five different sets of board for conducting fire tests.

5798 Justice Jackson: Do you mean perforated lath?

The Witness: Yes, five different styles.

By Mr. Steffen:

Q. And what was the first one, do you remember? A. The first one, I believe, was 11/16 inch holes.

Q. And were the holes staggered on the same pattern as appears on Exhibit 54? A. Yes; they were not exactly the same spacing, but with the same pattern.

Q. And then did you make another submission to the Bureau of Standards? A. Yes, we made five.

Q. All told? A. Yes.

Q. What was the second form that you submitted, if you remember? A. I believe the second form was a combination of perforations and indentations.

Q. What was that? A. The perforations on that board were 5/8 inches, and the indentations were approximately 1 inch long by a quarter of an inch wide, and about an eighth of an inch deep.

Q. And then you made, you say, two other submissions to the Bureau of Standards before you finally sub-
5799 mitted the pattern of Exhibit 54? A. Yes, that is true.

Q. And can you state whether you understand that your board has passed the one-hour fire test?

Mr. Bromley: I object to that as immaterial and incompetent. It seems to me that the report of the Bureau of Standards on the test is the best evidence.

Justice Stephens: His understanding whether it passed is not competent. If he has seen the fire test and seen his board stand up against fire for a given length of time, and can personally testify that it did stand up within his own knowledge, he can testify as to that; but as to whether it has passed some test of the Bureau of Standards would have to be shown by the Bureau of Standards report.

By Mr. Steffen:

Q. Did you witness any tests before the Bureau of Standards, Mr. Tice? A. No, I did not.

Q. Did you ever talk with the United States Gypsum Company in regard to perforated lath? A. No.

Q. Did you ever talk with Mr. Knode? A. Oh, yes. Yes, I talked to Mr. Knode.

Q. With regard to what matter, Mr. Tice? A. With regard to a license agreement on perforated lath.

5800 Q. Can you fix the time, approximately? A. It was in the fall of 1937, I believe, about the middle of the month of September.

Q. And how was the meeting arranged, where was it held? A. The meeting was arranged by a telephone ap-

pointment made by Mr. English of the United States Gypsum Company.

Q. Who was Mr. English? A. He is the District Manager for the United States Gypsum Company in California.

Q. And where was the meeting held? A. At the office of Schumacher Wall Board Corporation in Los Angeles.

Q. Were you present? A. Yes.

Q. Who else was present? A. Mr. Knode, Mr. English, Mr. A. R. Moylan, and myself.

Q. I neglected to ask you earlier, what is your office with the company, Mr. Tice? A. My position?

Q. Yes. A. I am Secretary and Assistant Treasurer.

Q. Now, will you tell us what transpired at this
5801 meeting? A. Mr. Knode remarked that he was informed, and was of the opinion, that we were infringing some of United States Gypsum Company's patents.

Q. Did he mention the perforated lath patent? A. Yes, he particularly mentioned the perforated lath patent, and he said that in view of the alleged infringement, he thought we should execute a license agreement.

Justice Jackson: That you should execute it, or that they should execute it?

The Witness: That we should accept one.

By Mr. Steffen:

Q. What was said, if anything, to Mr. Knode? A. We told Mr. Knode that we were of the opinion that we were not infringing any of their patents.

Q. And did you take out a license? A. We did not.

Q. Was there mention made, in the conference, of a foam process? A. Yes.

Q. What was the conversation, if any, concerning that?

Mr. Bromley: I object to that as immaterial, in addition to the general objection which I already have noted in the record.

Justice Stephens: Read the question. I wasn't
5802 quite able to hear it.

(The question was read by the reporter.)

Mr. Bromley: The ground of that additional objection is that the only charge in the complaint, as to which this evidence could be material, that is, evidence from Mr. Tice and what was done on the Pacific Coast, relates to the perforated lath patent, because there the complaint charges that the defendants, or some of them, had advice that it

was invalid. Now there is no such charge in the complaint as to the Roos foam patents, and testimony with respect to those patents, in this connection, is immaterial to any charge in the complaint.

Mr. Steffen: We make the same point, Your Honor, here, also, that under the complaint there is a charge that not only the perforated lath licenses, but also the foam and the starch licenses, were obtained or taken under subterfuge. That is in paragraph 46. It is the contention, as I understand it, of the defendants, that they were strictly bona fide, and they state in their answers that they were taken as bona fide license agreements, and necessary agreements.

It is an issue, as we see it, whether or not it wasn't quite possible for a company to operate successfully not using the foam process. Therefore, it seems to me that on much the same theory, we can offer the evidence of the Schumacher people as to the form of board they made,
5803 and have this witness state whether they did or did not use the foam process.

Justice Stephens: We will take the morning recess at this time.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

5804 Justice Stephens: With respect to the last objection before the Court, I might say this, Mr. Steffen. Of course we don't expect you to prove your case entirely out of the mouth of one witness, or from one witness by one sentence, but the theory under which we received this evidence I thought we made clear, concerning perforated lath, which was that it might be some evidence—we are not making any comment on weight—under the issue of subterfuge, and lack of bona fides in the license agreement, to show that a large amount of perforated lath was being made and sold without protest by USG.

Now unless you intend to show that this company also made something in the nature of the foam process board, and sold that on a large scale, I should think there might be some doubt about the admissibility of the answer to this particular question.

Mr. Steffen: My thought is to show that they sold the board they made in competition with Certain-teed, National and U. S. Gypsum, in California, and that they have been, throughout this period, making their own board without any licenses from USG.

Justice Stephens: You mean a board which has the qualities of the foam process board?

Mr. Steffen: It has qualities that allow them to compete with the foam process board.

5805 Mr. Bromley: You mean by that, Mr. Steffen, that it does not have the light-weight quality and other advantages of the board manufactured by the foam process?

Mr. Steffen: It isn't as light as the board which USG makes.

Justice Stephens: We will permit the question to be answered, subject to a motion to strike. But it seems to me that as you have now stated it, you are in danger of invading your own theory. Your own theory of the admissibility of this evidence with respect to perforated lath was that the perforated lath was made, in other words, lath which has holes in it and has the claimed qualities of perforated lath, notwithstanding the absence of a license, that it was made and sold in large quantities by this company, and that there was no protest by USG, and no infringement suit; and therefore that is some evidence as tending to show that USG did not have any faith in its own patents. That is the theory that you select to bring this evidence in on. Now it seems to me that consistently you ought to be offering to prove that there was a board something in the nature of the foam process board, made by this company and sold without protest by USG.

But we will hear your evidence, subject to a motion to strike if it appears not to be relevant on your theory.

Justice Jackson: You are not offering this, on 5806 that particular theory, are you?

Mr. Steffen: No, not on that theory at all.

By Mr. Steffen:

Q. Was there any question concerning the foam process during your conference with Mr. Knode? A. Mr. Knode made the statement that he thought it would be to our advantage to take out a license agreement on the foam process.

Q. And what did he say was the advantage? A. That the advantage would be lightening of the board, thereby saving freight charges and saving materials which would go into the manufacture of the board, principally gypsum.

Q. Did you understand also from Mr. Knode's offer, that there would be price-fixing?

Mr. Bromley: I object to his understanding as incompetent.

Justice Stephens: Objection sustained. State what was said. Say what else he said, if you will, please.

The Witness: He offered then to send us a detailed estimate of what these savings would amount to, which he did, by letter.

By Mr. Steffen:

Q. Did he make an offer of a form of contract to you? A. Yes.

Q. How many or what contracts were offered? A. There were two forms of license agreement, one of
5807 them containing a number of patents, including the foam process.

Q. And the other? A. The other one related to the perforated lath.

Q. And did those contracts, as offered to you, provide for price fixing, do you remember? A. They contained a clause retaining the right by the licensor to fix minimum selling prices.

Q. Now I want to show you what has been marked Government's Exhibit No. 604 for identification—

Justice Jackson: (Interposing) We do not have those exhibits, do we, Mr. Steffen?

Mr. Steffen: No, your Honor, you do not have that exhibit. I just barely got the photostating back.

Justice Jackson: Have the defendants seen them?

Mr. Steffen: No, they have not.

(The document referred to was marked Government's Exhibit No. 604 for identification.)

(Photostatic copies of Government's Exhibit No. 604 for identification were handed to the Court and to defendants' counsel. A copy was then handed to the witness.)

By Mr. Steffen:

Q. This purports to be a letter signed by Mr.
5808 Knode, addressed to Mr. Moylan, of the Schumacher Wall Board Corporation, under date of October 1, 1937. Have you examined Government's Exhibit No. 604, Mr. Tice? A. Yes.

Q. Is that a letter which you received? A. Yes, it was received by the Schumacher Wall Board Corporation.

Q. Now did your company subsequently take out a

license under the foam patent or the perforated board patent from USG. A. No sir.

Q. Have you ever taken out a license from USG? A. No sir.

Q. I notice that Government's Exhibit No. 54 has a covered edge. When did you start making a covered-edge board?

Mr. Bromley: I object to that—in addition to my general objection—on the ground that there is no charge in the complaint with respect to any knowledge, or rather any advice to any of the defendants, as to invalidity of the covered-edge patent.

Justice Stephens: Well, in view of the theory under which this evidence is being offered and received, that objection is overruled.

By Mr. Steffen:

5809 Q. You may answer. A. In 1936.

Q. You started to make the covered-edge board in 1936? A. Yes sir.

Q. Will you state, Mr. Tice, how much your board weighs, your 3/8" board, per 1000 square feet? A. The 3/8" wallboard weighs approximately 1800 pounds per thousand square feet.

Q. And what does the 3/8" lath weigh, as you make it? A. 3/8" lath weighs about 1750 pounds per thousand square feet.

Q. And can you state what you use to make the core of your board, now? A. We use gypsum and sawdust.

Q. And about what percentage of sawdust, or how much? A. About 35 pounds per thousand square feet.

Q. 35 pounds of sawdust? A. Yes.

Q. What would that be in terms of cubic feet? A. That is about three cubic feet.

Q. And that would displace how much gypsum, by weight, approximately? A. Probably 75 pounds.

Q. And do you use any other ingredients in your composition of the core? A. Yes, we used processed corn flour.

5810 Q. And how long have you been using that? A. Since the latter part of 1928 or the first of 1929.

Q. And in what proportion? A. In the 3/8" board that runs about 10 pounds per thousand square feet.

Q. And the purpose of using that is what? A. The

purpose is to form a binder and secure adhesion of the paper to the core.

Q. Are you familiar with the USG patents covering the making of wallboard? A. I don't know what patents you refer to.

Q. I think that was a very broad question.

Are you familiar, for example, with a machine patent, the Utzman Patent No. 1,330,413?

Justice Jackson: For a machine?

Mr. Steffen: For a machine for forming a closed-edge board, yes.

The Witness: I have read that patent many years ago.

Justice Stephens: Are you an engineer?

The Witness: No, I am not an engineer.

Justice Jackson: Are you a lawyer or a patent lawyer?

The Witness: No sir.

By Mr. Steffen:

Q. Did you have any advice from counsel concerning the way you manufactured board, as to whether it
5811 might be an infringement of USG Patent No. 1,330,-413?

Mr. Bromley: I object, unless it be shown whether it was in writing or not.

By Mr. Steffen:

Q. Did you have any oral or written advice of counsel concerning Patent No. 1,330,413? A. Yes, we had oral advice.

Q. And what did your counsel say?

Mr. Bromley: I object to that as immaterial.

Justice Stephens: What is the question which was first stated before the objection was made as to whether or not it was oral or written. Read that question.

(The reporter read the question as above recorded.)

Justice Stephens: That relates to the closed-edge board, does it?

Mr. Steffen: That is right.

Justice Stephens: What is the theory of that?

Mr. Steffen: It has to do with machine. I think this is all substantially on the same theory, that is that the defendants in this case are contending that among other things they needed Patent No. 1,330,413, which was the machine patent, and we have on the stand Mr. Tice, whose company has made a closed-edge board since, I think he said, 1936, and we expect to show that that was made properly, not-

withstanding the Utzman Machine Patent.

5812 Justice Jackson: On the same machine?

Mr. Steffen: No.

Justice Jackson: On a different kind of machine?

Mr. Steffen: Yes—indicating that it was not a necessary patent at all.

Justice Stephens: Then your theory here is the same as with respect to the perforated lath?

Mr. Steffen: Substantially the same, yes.

Justice Stephens: The objection is overruled.

Mr. Steffen: You have told us that you did have advice from patent counsel as to whether your machine for making folded-edge board, closed-edge board, constituted an infringement of the USG patent. Can you state what your counsel advised you on that point?

Mr. Bromley: I object to that as immaterial and incompetent. There is no issue here as to what his counsel advised him.

Mr. Steffen: I think that may be properly withdrawn, your Honor.

By Mr. Steffen:

Q. You did, as I understand your testimony, after receiving advice from your counsel, proceed to make a machine for turning or folding the edge, so as to put out a closed-edge board, is that correct?

Mr. Bromley: I object to that as incompetent, because it is a question which creates an inference which is

5813 not warranted, as to what the advice was.

Justice Jackson: Ask him what he did.

Justice Stephens: The objection is sustained. Ask him what he did.

By Mr. Steffen:

Q. What did you do with regard to making a closed-edge board in 1936? A. We built the machinery necessary to make it, and started making it.

Q. Did you ever receive from counsel for USG any notice of an infringement of Roos Patent No. 1,938,354? A. Yes.

Q. Did they ever bring suit against you?

Mr. Bromley: I object to that as immaterial.

Justice Stephens: We will receive it under this general theory of subterfuge. The objection is overruled.

The Witness: No, they never did.

By Mr. Steffen:

Q. Your company is the owner of a Makowski Patent, is it not? A. Yes.

Q. Is that patent No. 1,349,778? A. I don't remember the number..

Q. I show you a soft copy of what purports to be Makowski Patent No. 1,349,778, which I ask to be
5814 marked for identification as Government's Exhibit No. 605.

(The document referred to was marked Government's Exhibit No. 605 for identification.)

(Government's Exhibit No. 605 for identification was handed to the witness.)

By Mr. Steffen:

Q. I will ask you if that is the patent which your company owns?

Mr. Bromley: I object to that as immaterial, in addition to the grounds that I have already stated.

Justice Stephens: What do you intend to prove by the introduction of the Makowski Patent? Is that on perforated lath?

Mr. Steffen: Yes, your Honor, issued in 1920.

Justice Jackson: It is no longer a live patent?

Mr. Steffen: No, it has expired.

Justice Stephens: Well, I am again puzzled, Mr. Steffen. I thought the theory on which you were introducing this evidence with respect to perforated lath was that this company felt entirely free to make it without patents, and therefore that that was some evidence that USG did not have any faith in its own patents.

Now you are going to prove that the Schumacher Wall Board Corporation made board under a patent, apparently.

5815 Mr. Steffen: Your Honor stated that that was our position, that it was a question of whether or not the United States Gypsum people had any faith in their own patents or not. That was not quite the way—

Justice Stephens: (Interposing) Then I think you are under an obligation to tell me so, Mr. Steffen, because I am trying hard to make rulings clearly and consistently, and to give full effect to any proper theory that the Government has, and if I misstate your theory, you ought to tell me.

Mr. Steffen: I am now doing the best I can.

Justice Stephens: Very well.

Mr. Steffen: While it might also show that the United States Gypsum Company didn't have faith in their patent—and I think it does as respects the perforated lath patent of USG—the theory is that the defendants, plus USG, and particularly Certain-teed, didn't care whether it was valid or not valid. They were primarily interested in stabilizing the market, and therefore they said, "Why should we even bother?"

As Mr. Spencer testified yesterday, the Certain-teed people never even made any tests to see if they could avoid—or make board, which didn't come within the terms of the Roos Patent. They said in effect, "We would very much appreciate, for business reasons" (I am speaking generally) "to go under the patent and have the
5816 advantage of price control and a 25-cent advance."

Now that, as we see it, is what the circumstances would indicate.

Now here is a company which has had a patent since 1920 covering a perforated board, which we will be able to establish by calling Mr. Ingberg from the Bureau of Standards, does pass the Bureau of Standards one-hour fire test.

I think that Mr. Tice will tell us that he has never been approached at any time by anybody to take a license under the Makowski patent—indicating, as we see it, that the defendants were not very much concerned, either on the one hand in getting a patent already in existence which would not require price fixing, or making a board which didn't come within any patents. They were primarily concerned, as we see it, with price fixing.

Justice Stephens: Well, I don't think now that I did misstate or misunderstand your theory.

Mr. Steffen: Well, I hope not.

Justice Stephens: As I understand still, the theory of the introduction of this evidence with respect to perforated lath is that since this company made, freely, large quantities of perforated lath of assertedly the same substantial qualities as the perforated lath of these defendants, and that the defendants did not protest, and USG didn't protest, that that was some evidence that the defendants,
5817 and USG, did not believe in their patents.

Now the question we have before us is whether or not this Makowski Patent should be received in evidence, under which patent some form of perforated lath could be manufactured. That is the point that is troubling me now,

because it doesn't seem to me to be consistent with your own theory.

Take an illustration, clearly out of the field of this case, for instance, showing the trouble that I have in my mind, where one person, a manufacturer, has a patent, or a patent license, to manufacture a form of shoe device called buttons, shoe buttons, and he goes ahead and manufactures the shoes which contain those buttons. Is it any evidence that he doesn't believe in that patent, that somebody else has a patent who manufactures shoe laces?

Mr. Steffen: No, your Honor.

Justice Stephens: They both serve the same function, they both close up the fronts of shoes.

What does it prove in the way of bad faith on the part of one man who manufactures under his patent, that somebody else manufactures something else under a different one?

Justice Jackson: With respect to this patent, Mr. Steffen, isn't what you are attempting to show simply that the Schumacher Company made perforated board during the life of the patent, in accordance with the patent, and since then they have still been making it, although the patent has become public property?

5818 Mr. Steffen: Practically.

Justice Jackson: Now what inferences may be drawn from that, or what weight may be attached to it, would come later. That is the way I see it.

Mr. Steffen: Yes sir.

Justice Stephens: Well, my colleagues are of the view that the Makowski patent testimony may come in, subject to a motion to strike if its relevancy and materiality does not eventually appear. I think it would be consistent, myself, to continue to show, as you have already shown under the theory on which we have admitted this evidence, that large quantities of perforated lath were made without reference to patents. But I cannot myself see yet how it proves any bad faith on the part of the defendants to prove that somebody else was manufacturing similar material under a different patent.

But I defer to the views of my colleagues, and you may proceed with the examination.

Justice Garrett: May I make this statement in view of the statement of the presiding Judge?

Justice Stephens: Certainly.

Justice Garrett: I don't mean to indicate, by admitting this evidence, that I think it shows any bad faith. That is a question to be determined later on, and I wouldn't wish it to be thought that in agreeing to its admission, I in any way think it proves anything.

5819 Justice Stephens: I didn't mean to give a mis-impression of my colleagues' views. I simply meant that as I understood my colleagues' views, they thought it might have some tendency or some possible relevancy on that theory, and that I was not able to see it so far as the Makowski Patent is concerned. I have concurred in their rulings so far as your right to prove wholesale manufacture of perforated lath without reference to a patent.

Mr. Steffen: May I say about ten words in regard to your Honor's illustration regarding the shoe buttons and shoe laces?

Justice Stephens: Yes.

Mr. Steffen: Those I would regard as quite different things.

Let's go back to Mr. Bromley's illustration last night of a tungsten filament lamp and an aluminum filament lamp.

Assuming that they are equally good lamps, starting with that assumption, if it can be shown—this is an argument on relevancy—that the industry, all of the people making lamps, decide, "Well, let's take the tungsten filament lamp because we can fix prices on that," and the aluminum filament lamp is held by somebody else, and they say, "We will just squeeze them out,"—I would say that that would be definite evidence to show that they picked the tungsten filament lamp rather than the aluminum filament lamp, for purposes of getting together.

5820 In other words, if a group get together and suppress one and fix prices on another, it seems to me to be very good evidence of subterfuge.

In the present case the Makowski Patent was called to the attention of Certain-teed by Mr. Spencer, and it appears in his letters which were admitted yesterday.

I would like to ask the witness a question now.

By Mr. Steffen:

Q. Mr. Tice, did anyone ever apply to your company for a license under the Makowski Patent? A. No.

Q. Anyone at all? A. No.

Mr. Steffen: I wish to offer now—

Mr. Bromley: (Interposing) Just a moment, before you proceed, Mr. Steffen, did I understand you correctly to say that you represented to the Court that Mr. Ingberg of the Bureau of Standards would testify that lath made under the Makowski Patent passed the one-hour fire test?

Mr. Steffen: I will have Ingberg state that Government's Exhibit No. 54, or lath made according to that description—I don't know whether Mr. Ingberg can testify as to whether it was made under one patent or another, I don't think he is a technical man on that—but he will testify to the thickness of the lath, the spacing of the
5821 holes of the sample which was submitted by the Schumacher Company, and will state that it passed the one-hour fire test. I have here the report of the Bureau of Standards.

Justice Stephens: To pursue your illustration a little further, just for the purpose of testing out your theory and getting it clear in my mind, because I am afraid it isn't yet, and I want you to have every opportunity to convince me—as I understand your last statement, you contend that if there was a patent on an aluminum filament for incandescent lamps, and also a patent on a tungsten filament for incandescent lamps, the fact that a group of persons got together and took licenses under the tungsten filament patent would be evidence that they were taking it for business, rather than patent purposes?

Mr. Steffen: May I make this point—

Justice Stephens: I want to ask a further question. Suppose that one group took licenses under the tungsten patent, and another group took licenses under the aluminum patent—which group would you say then was acting under subterfuge?

Mr. Steffen: I would say this, your Honor, that we are getting out into territory that the Courts have not decided, or not ruled upon.

I start with what I understand is the law as stated by the General Electric case, which had to do, as the Court there said, with patents which completely monopo-
5822 lized the making of a filament lamp of that general type. The difference between the old carbon filament lamp and the tungsten filament lamp was the difference between the horse and buggy and the automobile, practically.

So it was an entirely new basic field. And in that situation the Court said that where you have that type of pat-

ent, and that is the only one that is available, under the facts of the case, price fixing there was held permissible.

Now, we will, at some later time in these proceedings, argue in detail—I think Mr. Bromley will—the variances between the General Electric case, and one very sharp variance in this case, as we see it, is that there are a lot of other patents that were available, and that the patents upon which the defendants were operating were not basic in any sense.

I think that becomes a very important factor, because the moment you get the whole industry together under any patent, the argument can certainly be made from that circumstance, which was not true in the General Electric case, that they chose that with the idea of getting together, while they might have taken one, two or three other patents and stayed in a competitive field.

Justice Stephens: Well, I perhaps am leading the argument too far afield. I thought what the Court held in the General Electric case—I will try and hold my mind open to further persuasion on the final hearing of arguments in this case—but I thought that what the Court held in the General Electric case was that notwithstanding that it was a basic patent and covered the entire manufacture at that time, and notwithstanding that the industry was largely monopolized in the manufacture under the tungsten patent, that still price fixing was valid.

5823

Mr. Steffen: My motion is just the reverse, your Honor, that inasmuch as they did have a good basic patent covering the process, going along to protect it, that they might fix prices.

Justice Stephens: Your contention necessarily leads you, then, does it not, to the proposition that there can't be any valid licensing or price fixing or royalty collecting upon anything except a basic patent; that no improvements can be licensed and price-fixed?

Mr. Steffen: Well—

Justice Jackson: You are going to argue this later on, aren't you?

Mr. Steffen: Yes, your Honor.

Justice Jackson: Then why spend too much time on it now?

Justice Stephens: I apologize to my colleagues. Perhaps I am asking too many questions at the time, but your evidence is being offered, as I understand it, under some theory with respect to the meaning of the General Electric case.

Mr. Stephen: That is right.

5824 Justice Stephens: Since I have to take the major responsibility in announcing the rulings, I would like to know what the theory is, and I still don't get it, and I still don't get how the fact that these people were manufacturing under the Makowski Patent proves anything with respect to the subterfuge of the defendants in connection with the Roos perforated lath patent, but I again defer to the views of my colleagues that it may have some tendency to prove subterfuge, and therefore you may proceed.

I apologize for taking so much time, perhaps unnecessarily.

Justice Jackson: I might put this one line into the record. I think I have made myself perfectly clear, but I wish to again state that the fact that I consider this to be properly admissible does not mean for a second as to what it proves in my mind. I don't know, and won't know until later.

Mr. Steffen: We offer Government's Exhibit No. 54, which is the sample of the perforated lath.

Mr. Bromley: I object to it as immaterial.

Justice Stephens: Objection is overruled. It will be received in evidence.

(The sample referred to was marked Government's Exhibit No. 54 for identification.)

Mr. Steffen: We now offer Government's Exhibit

5825 No. 604, Mr. Knode's letter, and I want to offer it on a somewhat different ground, which ground I will now state.

Mr. Knode's letter is a statement to the effect that under the foam process it is possible to make savings greater than the amount of royalty which he is charging. That same point came up in Mr. Avery's statement to the prospective licensees in May, 1929, and I think it is material to get this as a further admission on the part of United States Gypsum Company that in their view, when they were offering, in May, 1929, the foam patent, that it did not constitute any ultimate loss to the licensee, and that has a very definite bearing, as I see it, upon the nature of their offer, and on the showing or possible showing there of an agreement among the parties that, "Here is a good patent upon which we can fix prices, and which won't cost us anything after we take our savings."

Mr. Johnston: If the Court please, I hardly know what to say. I haven't seen this exhibit. I asked the Clerk yes-

terday if there were any exhibits, and he said there were none.

Mr. Steffen: That is right.

Mr. Johnston: I asked Mr. Steffen if there would be any exhibits, and he said there would be none. And now they are talking about some kind of a letter, or an offer, with the witness on the stand who says that he, like Texas, didn't take out this license. I don't know what position it puts us in.

5826 I don't want to be pestering counsel and the Court here so many times about the privilege of seeing these exhibits, so I think I will just let the record show my objection, a running objection, to the offering of any more exhibits of any kind by the plaintiff until I have had an opportunity to examine them.

Justice Stephens: Well, the Court has made a definite ruling that it will not consider or take into evidence exhibits that defendants' counsel haven't had an opportunity to examine. If you haven't seen this one, you can take your time now and look at it.

Justice Jackson: Have you seen this, Mr. Johnston?

Mr. Johnston: No, I have no idea what it is.

Justice Jackson: Then you may take my copy.

(Justice Jackson's copy of Exhibit No. 604 was handed to Mr. Johnston.)

Mr. Johnston: They take one set and give it to principal counsel, and of course I wouldn't take the responsibility of taking it away from him, and then they offer it in evidence here. That has happened at least twenty times in this trial, and the Court has admonished counsel for the plaintiff about it, but we get no results.

So I am just going to let my running objection stand in the record here, for whatever it may be worth.

Justice Stephens: That objection may be recorded,

5827 and if you will call to the attention of the Court the fact that you have not seen an exhibit, or a photostatic copy of it, the Court will not act on it until you have seen it and have had adequate time to examine it.

Mr. Steffen: I want to say, your Honor, that I think we have done a relatively good job in getting a large number of exhibits photostated. We have no purpose at all in trying to have exhibits admitted which have not been examined by counsel. As I stated to your Honor this morning, this exhibit got tied up in our photostating department. We cannot get these things through just as quickly as we would like to have them.

Justice Stephens: We understand that, Mr. Steffen, there is no culpability involved, I assume, but nevertheless the defendants have a right to look at these exhibits before we take them in evidence.

Mr. Steffen: We certainly agree to that.

Mr. Johnston: (After examining exhibit.) I want to also add, on behalf of Texas, our objection, because this has no relevancy or materiality, and could not in any manner be binding upon Texas.

Justice Stephens: Well, it is received in evidence under the general theory that one conspirator, if charged to be a conspirator, is bound by the acts or declaration of another in furtherance or execution of the conspiracy. It is received in evidence, subject to the usual reserva-
5828 tion with respect to declaration of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 604 for identification, was received in evidence.)

Mr. Bromley: As I understand it, this Exhibit 604 is offered under some special offer which, as I understand it, is that it is because the licensor offered a license to a licensee and told him he could save money if he took the license, even though he paid the royalty—that then the price-fixing clause in the license became unlawful.

Mr. Steffen: I would state that a little differently—

Justice Garrett: (Interposing) But that does state the substance of what you said, doesn't it, the theory upon which you presented it?

Mr. Steffen: If you put it in the context of Mr. Avery's statement in 1929, your Honor, yes.

Justice Garrett: Now I thought so, and I had intended to make this statement, and I wish it to stand, so far as I am concerned, for others. The fact that we may admit some evidence here does not commit the Court, or certainly does not commit me, to the adoption of the theory upon which counsel may state that it is offered, and I want to make that clear. We may have an entirely different theory as to why it may possibly amount to something.

5829 Justice Stephens: Well, that is true. I think we all agree to that.

Of course a trial court is always under this difficulty, gentlemen, as you must well know from your experience as trial lawyers. If the substantive law of a case can be settled on a motion to dismiss the complaint, or on demur-

rer, then, if all of the substantive law can be settled in that manner, you don't get into these difficulties as to whether evidence is admissible or inadmissible, depending upon the substantive law.

But where there is a constant debate between counsel throughout the case as to what the substantive law is controlling the case, it is pretty difficult to make rulings with absolute finality where the admissibility of evidence depends upon substantive law.

We have to give each side a chance to present the case according to their own theories, and then hear the theories argued at the close of the case.

Mr. Steffen: Has Government's Exhibit No. 605 been admitted?

Justice Stephens: It has not been offered, as yet.

Mr. Steffen: Then I will offer it at this time.

Justice Stephens: That is also received, and the objections of counsel are overruled.

5830 (The document referred to, marked as Government's Exhibit No. 605, was received in evidence.)

Justice Stephens: You may cross-examine.

Cross-Examination

By Mr. Bromley:

Q. After you got USG's notice of infringement of the Roos perforated patent, you quit making that kind of lath, didn't you? A. Temporarily.

Q. Well, you didn't resume it again until after USG came out there in the market itself, did you? A. They were in the market before we ever made it, I believe, with that lath.

Q. After you got USG's notice of infringement of the Roos perforated lath patent, you stopped making the kind of lath you were making at that time, didn't you? A. Yes sir.

Q. Now you say that thereafter you resumed making perforated lath of some kind, do you? A. Yes.

Q. But the kind that you resumed with was a different kind, wasn't it? A. Yes.

Q. When you talked to Mr. Knode about his offer
5831 to you of two forms of license, or thereafter, you knew that the price-fixing provisions contained in the forms were limited to the right of USG to fix the prices of such board and lath as you should manufacture under

the patents licensed to you, didn't you? A. Yes, that was my understanding.

Q. Now, did you have any discussion with Mr. Knode at all about this price-fixing clause in the proposed form of license? A. None whatever.

Q. And isn't it the fact, Mr. Tice, that you and your company were willing to take a license under the Roos perforated lath patent, but it was USG's position that you could not have it unless you took a general license too? A. No, that is not correct.

Q. That is not correct? A. No sir, it is not correct.

Q. In other words, you were unwilling to take a license? A. Yes.

Q. Up until 1936, isn't it the fact that the principal product of your company, which you have referred to as perforated lath, was really indented lath? A. Yes, the principal part of our business up until that time was indented lath.

Q. Now indented lath is lath which has no perfora-
5832 tions in it at all, in the sense of a hole going completely through it, isn't that right? A. Yes sir.

Q. And indented lath is a lath product in which, by some machine or other, a little gouge is made on one side of the lath which penetrates the paper and core to a depth of an eighth of an inch, or less, isn't that right? A. That is right.

Q. That is just a little deep scratch or gouge on the surface of the lath, isn't it? A. No, the paper is pushed down into the core.

Q. But it is just a little gouge on one surface? A. That is right.

Q. And your company sold that under what name? A. Grip Lath.

Q. And that is what you have referred to, and what is frequently referred to, as perforated lath, as a general term? A. No, I wasn't referring to the indented lath when I was speaking of perforated lath.

Q. When you answered Mr. Steffen that you made perforated lath for this long time, you weren't referring to indented lath? A. No.

Q. Well, the fact is that this indented lath, up until
1936, was your principal product, isn't that right?
5833 A. Yes, that is right.

Q. You had a patent on that indented lath, didn't you? A. Yes sir.

Q. And you made that lath under the patent, didn't you? A. Yes sir.

5834 Q. Isn't it the fact, Mr. Tice, that the only perforated lath that you made prior to 1936, in the sense of a hole completely through the lath, was a lath which had 3/8 inch holes on 2-inch spacings, and you only made that on one or two occasions for one or two accounts? A. That is not entirely correct.

Q. Will you tell us what the facts are? A. The only perforated lath that we made with holes 3/8 of an inch in diameter would be from 1926 until about 1950. That was the principal product that we made during that time.

At about 1930, the indented lath became the principal product, and the production of the perforated lath dropped off to a very small amount.

Q. The perforated lath which you made during that period had 3/8 inch holes, didn't it? A. That is correct.

Q. And 2-inch spacings? A. No, they were spaced about 3-1/2 inches horizontally and about 2 to 2-1/2 inches vertically.

Q. Now, the purpose of these types of indented or perforated lath, out in your country, was to comply with a law requiring mechanical keys to exist between plaster and lath, in view of the prevalence of earthquakes out

5835 there; isn't that right? A. I believe that that is correct.

Q. And your 3/8 inch lath that you made prior to 1930, as you have described it, had no fire rating at all, did it? A. Not the perforated lath.

Q. That is what I mean. A. That is right.

Q. When you say "not the perforated lath", do you mean that your Grip Lath did have a fire rating? A. Yes, it had a fire rating on a test conducted by Smith, Emery & Company, which was accepted in California cities.

Q. That, of course, was not a Bureau of Standards fire rating? A. No, it was not.

Q. And that fire rating applied only to your Grip or indented lath, and not to this perforated lath with the 3/8 inch holes; isn't that right? A. Yes, that is right.

Q. Now, USG introduced its perforated lath on the Coast sometime around 1932, didn't it? A. No, I don't think so. I think it was 1935.

Q. 1935? A. Yes.

Q. Well, prior to the time that USG introduced its perforated lath, did you ever know of or see a perforat-

5836 ed lath with 3/4 inch perforations entirely through the board, spaced on 4-inch centers in parallel rows,

which had a one-hour fire rating? A. No, I did not.

Q. You never made a closed-edge board until 1936, you say? A. That is right, 1936.

Q. And, of course, that was long after the expiration of the Utzman closed-edge patent, wasn't it? A. It was after the expiration of the original closed-edge patent.

Q. We know that here as the Utzman patent.

Now, is it true that you have never used the USG bubble or foam process? A. No, we have never used it.

Q. And your board is and has been heavy board; isn't that right? A. Heavier than United States Gypsum board.

Q. And isn't your situation with respect to the weight of the board somewhat different, on the Coast, because, generally speaking, your shipping distances are not long? A. Yes, that has a bearing on the matter, because our freight absorption is less because most of our business is concentrated in a small area.

Q. Isn't it your practice to make a thinner board
5837 than is used here in the East? A. Yes, we do make a 1/4 inch wallboard.

Q. Have you found it necessary, in the manufacture of your board, to use a starch derivative in order to secure bond? A. We use a processed corn flour.

Q. Which is a starch product, isn't it? A. Well, it is a converted corn flour which contains dextrin and some starch.

Q. You testified, Mr. Tice, at the beginning of your testimony today, I believe, that between 1936 and 1938, you made perforated lath with holes of various sizes? A. Yes, sir.

Q. And among the sizes which you listed, you said 3/4 of an inch; is that right? A. Yes.

Q. Now, isn't it the fact that during that period, 1936 to 1938, the only 3/4 inch hole perforated lath you ever made was for one special order? A. That is correct.

Q. And you thereupon received a notice of infringement from USG, did you not? A. That was in 1935 when we received the notice of infringement on some board which we had produced in October or November of 1935.

5838 Q. Well, was that board, of which you now speak, board with 3/4 inch holes in it? A. Yes, that was board with 3/4 inch holes.

Q. You made some of that for one order in 1935? A. That is correct.

Q. Then USG sent you a notice of infringement about it? A. Yes, sir.

Q. And you have never made it since? A. Not that same type of lath.

Q. That answer goes right down to the present time, doesn't it? A. Yes, sir.

Mr. Bromley: That is all.

Justice Stephens: Any further cross-examination by other defendant's counsel?

(No response.)

Justice Stephens: Any re-direct-examination?

Redirect Examination

By Mr. Steffen:

Q. You were asked one question, Mr. Tice, in regard to the distances that you had to make shipments, and you said that your area was a smaller area. What were you comparing that with, what were you comparing your area with? A. I didn't exactly say it was a smaller area.

5839 I said that the large percentage of our business was concentrated within a small area, within a 100-mile radius of Los Angeles.

Q. How far do you ship? A. We ship as far as Salt Lake City, that is about the farthest distance.

Mr. Steffen: I have no further questions, Your Honor.

Mr. Bromley: No questions.

Justice Stephens: May this witness be excused?

Mr. Bromley: Yes, Your Honor.

Mr. Steffen: Yes.

Justice Stephens: You may be excused, then, and the Court will take its noon recess.

(Witness excused.)

5840 Mr. Steffen: Before you take the noon recess, I want to make an explanation.

We are approaching the end of the Government's case, as I think we told you a while ago, and we don't have as many witnesses, because there aren't as many witnesses left. We had expected to have Mr. Dahlberg this week, and Mr. Dahlberg had to be excused. We had also expected to work in, if we had any blanks in our schedule, many of the exhibits which we have sent out to have admissions upon. Those reports, or returns, are just coming in, although we granted further extensions of time at the request of each of the defense counsel.

Therefore we are in the predicament of not having anything ready this afternoon. We will be ready tomorrow morning.

Mr. Oliver: If the Court please, Mr. Haydon, whom the Government has called as a witness, has been here since early yesterday morning. He is an employee of the Celotex Corporation. I am most anxious that certainly by tomorrow evening, when we recess until April 11th, Mr. Haydon be on and off the stand, and excused, so that there will be no necessity for him to come back.

I believe it is only fair to ask that Mr. Haydon be put on the stand this afternoon, rather than proceed with the introduction of documents, which can take place at any time, and do not necessitate a man traveling back and forth
5841 from Port Clinton.

Justice Stephens: Can you put Mr. Haydon on today?

Mr. Steffen: I went over part of Mr. Haydon's testimony last night, with Mr. Oliver present. As he knows, we asked to have Mr. Haydon here earlier in the week, so we could get prepared. We did that after we had cancelled Mr. Dahlberg's appearance, at Mr. Oliver's request. That left us in a jam, and we worked last night going over Mr. Haydon's testimony. I wouldn't feel justified in starting his testimony this afternoon. I hope that we may tomorrow morning.

Justice Stephens: How long will his testimony take when he gets on?

Mr. Steffen: It will take probably a day.

Justice Jackson: Can't you put him on this afternoon and examine him as far as you are prepared to go?

Mr. Steffen: I would rather not, your Honor.

Justice Stephens: There isn't any particular point in having a witness, whose proposed testimony hasn't been gone over by counsel, put on, because that doesn't ordinarily save time, either for the Court or counsel. But it seems unfortunate that he has to make two trips here.

Mr. Steffen: We agree with that.

Justice Stephens: If he is going to be on all day tomorrow it means that he will have to come back, does it not? Do you mean that you will take all day tomorrow on direct, Mr. Steffen?

5842 Mr. Steffen: I didn't mean to imply that he would be on all day on direct, but what I meant to imply was that we will be able to finish with him tomorrow, both

direct and cross. Of course that depends on the length of the cross-examination.

Justice Stephens: Well, all counsel can do is do the best they can.

Mr. Oliver: I think that Mr. Steffen could use some time today on the examination of Mr. Haydon, because he talked with Mr. Haydon last evening for about an hour and a half. Mr. Steffen has indicated that he has been delayed in this because Mr. Haydon arrived here only yesterday. I have a written statement here from Mr. Knuff requesting us to have Mr. Haydon here Wednesday morning, March 29th.

Now when we talked about Mr. Dahlberg, I told Mr. Steffen that Mr. Haydon had made his reservation to be here, and that was just about a day prior to the time he would have to take the train to get here, on the reservation I specifically had him arrange for, to be sure to be here on Wednesday, and it was my understanding from that conversation that he would go right ahead and be here Wednesday morning because he had a reservation, and it is hard to get reservations at this time, and from such a long distance, as we all know.

Justice Stephens: Would there be any possibility, Mr. Steffen, if we now adjourn until three o'clock this afternoon, of your putting Mr. Haydon on then? Would
5843 you have sufficient time between now and then to finish your preparation?

Mr. Steffen: It starts a new phase of the case, your Honor, and I would really feel not justified in putting him on. I understand that it is very awkward from Mr. Haydon's standpoint, but we have done our level best to meet everybody's convenience.

Justice Stephens: We think, Mr. Oliver, that we ought not to assume to compel the Government to put a witness on before they have had reasonable time to prepare their examination. It doesn't save time for anyone in the long run, and it appears that the Government is doing the best it can under the difficulties of a complicated case, with many exhibits and witnesses to deal with.

So we will try and finish with Mr. Haydon tomorrow, if we possibly can, but if not, he may have to come back.

We will now recess until tomorrow morning at ten o'clock.

(Whereupon a recess was taken from 12:20 p.m. until 10:00 o'clock a.m. of the following day, March 31st, 1944.)

5844 IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA,

Plaintiff,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS,

Defendants.

Seventh Floor,
Internal Revenue Building,
Washington, D. C.,
Friday, March 31, 1944.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

APPEARANCES:

(Same as heretofore noted.)

5847 I would like to make one brief statement, Mr. Steffen. I would like to ask you one question, just to clear up my own mind.

In reading over this record last night, and in re-reading some of the leading cases recently, I have begun to wonder if perhaps this is the nature of your contention with respect to the evidence we were discussing yesterday, and the covering patent aspect of the General Electric case to which you referred. Is this what you are contending: that in the situation in the General Electric case, the only patent available which would successfully manufacture the tungsten filament, or an incandescent light filament, was the one owned by the General Electric Company, and that therefore the taking of licenses under that patent is not subject to the inference that it was done for any reason except to obtain the benefit of the patent; whereas, as you contend with respect to perforated lath, if there were other patents—like the Makowski patent, and others to which you may have referred—under which perforated lath or board could be made, the fact that the licensee defendants in the instant case took their licenses 5848 from the USG rather than from some of these other patentees is some evidence that they took their licenses from the USG for the purpose of price fixing, because forsooth, they might not have had to pay royalties under the other patents.

Is that the nature of your contention?

Mr. Steffen: I think that well states the nature of our position on the subterfuge argument; and that, of course, was the basis upon which we were offering the testimony.

Justice Stephens: I see.

Well, I didn't clearly understand it yesterday, and I want to be sure I understand, if I can, the contentions of each side.

You might make a brief comment on that, Mr. Bromley—

Mr. Steffen: (Interposing) May I make one more point, in connection with that?

Justice Stephens: Yes.

Mr. Steffen: I want to make a point which I think Your Honors might well consider, too, that there are various types of patents. That is, there are basic patents, and there are slight improvement patents, and there are process or machine patents, so-called, and there are combination patents. The price fixing feature has been allowed most clearly in the case of basic patents. Where a patent holder simply has a machine patent or has a

process patent, we contend—and I think the defen-
5849 dants practically admitted—that you can not fix prices on the article made.

If you have a combination patent, that is, use several elements in one combination, the Mercoid case has now decided very clearly that there may be no control of sales policy, and certainly not of price fixing, of any element going into that combination—

Justice Jackson: (Interposing) Any unpatented element going into the combination?

Mr. Steffen: Yes. And that is material here, because the Roos patent on metallized lath is nothing but a combination patent. The Roos patent is not an article patent, it is just a combination patent.

So that the first point is subterfuge; and the second point is that apparently, as a substantive matter, there has to be a patent of a particular quality before—even though there were no subterfuge—they would be permitted to fix prices, in the face of the Sherman Act.

Justice Stephens: Do you wish to make any comment upon that contention at this time, so that the Court will hear what both sides contend with respect to it, Mr. Bromley?

5850 Mr. Bromley: Yes, may it please the Court.

I think I should advert to the fact that the Roos perforated patent, the Roos perforated board, and the perforated license—that whole subject matter is treated in the complaint under the heading of Subordinate Licenses.

We are not confronted with a situation here where the only patent involved in the suit is the Roos perforated patent, and where everything was done under that. Of course I think it is perfectly apparent that we could have fixed the price of the Roos perforated lath under the general license.

Now since it was, as we maintain, a product patent, not a process patent—it was a different type of lath—we chose to issue a separate license concerning it, and to reserve the price-fixing right in the separate license. But the price could have been fixed under the general license.

Justice Stephens: For the reason that it is, in addition to being perforated, a closed-edge board?

Mr. Bromley: For the reason that in addition to being perforated, the closed-edge patent having expired, it used many other important fundamental patents, such as the Haggerty starch patents and the Roos foam patents.

So that the situation does not justify, even in the light of the allegations of the complaint, the emphasis which the Government is putting, it seems to me, on the Roos patent, and on the Roos lath and on the Roos license,
5851 because in their pleadings they treat it only as a Subordinate License.

Now in what your Honor has said at the outset this morning, I don't see that that changes the problem any from the way you posed it the other day.

Suppose there were other patents under which an electric light bulb could be made—a different bulb, but still it gave light—it hardly seems to me that those facts will raise any inference that either one set of licensees or the other had a purpose to secure price fixing, rather than the patent use.

If you had two sets of patents covering two different bulbs, but the bulbs were substantially the same in so far as they were made of glass and brass and wire, and gave off light, I don't see how anybody can say that because one group of men took licenses under one patent, that it should be inferred that what they were after was price fixing just because there was another patent that covered the same thing.

Justice Jackson: You mean that that would not be a logical inference?

Mr. Bromley: Yes, and it would not raise any inference at all, it seems to me, and I cannot see what difference it makes whether one group of men paid royalties or whether they didn't. Normally, royalties are paid; normally, the licensee gets more, in value, than the royalty he pays—else he wouldn't pay the royalty.
5852 If I pay a royalty of one cent a bulb for every bulb that I manufacture, I must figure that the right which I get is worth more than one cent, or I wouldn't pay the one cent.

So that I don't see what difference it makes, or I don't believe the fact that one set of licensees must pay royalty, and the other set needn't pay any, or that one set must pay a higher royalty than the other, raises any inference one way or the other. That is a matter of bargaining between the parties, just like with the purchase of any commodity. A licensee buys a right, and what he pays for it is arrived at by bargaining.

So that I don't see that the issue is changed at all.

Justice Stephens: Well, thank you, gentlemen, for mak-

ing that statement. We are anxious to know what the contentions are on both sides as to each of these issues.

Call the next witness so that we can finish with him today, if possible.

Mr. Steffen: We would like to make a short statement, your Honor.

We have reached the happy stage where we don't have any more witnesses. We have practically completed the Government's case-in-chief. We had expected, and considered, with Mr. Haydon, the possibility of opening up an entirely different line of testimony. However,
5853 after very careful consideration we have decided that it will save the time of the Court, and make for a more orderly presentation, if we wait until after the defense has put on its case, and then we may or may not need to call Mr. Haydon at all. That is in the event, of course, that the defense puts on any case, in the event, in other words, that the case is continued after the Government rests.

Now having no other witnesses at this time, I want to make a short statement in regard to the week of April 11th. At that time we will have Mr. Dahlberg, who we were forced to continue—he was called for this week, but Mr. Adams and Mr. Oliver both asked to have Mr. Dahlberg put over until the next session.

We have also Mr. Stromquist who couldn't be here until the week of April 11th. We will also call Mr. Ingberg, who will give testimony concerning the fire tests on the National lath, on the Schumacher lath, and also on the USG lath.

Now I don't wish to be bound by just those three witnesses, as there may be one or two others, but I will say to the Court that that should—and as we now see it, will—complete the direct evidence of the Government.

Justice Stephens: You have also, have you not, some exhibits to offer, concerning which you requested stipulations of genuineness?

Mr. Steffen: Yes, your Honor, I want to make
5854 a comment on that.

In order to save time we sent out exhibits to three of the defendant companies. That would save calling, as we figured, several witnesses to identify the exhibits, and therefore save a great deal of time on the part of the Court. We have not yet received from Mr. Adams, of Certain-teed, the answers to our requests. We asked

him, as of March 6th, to give his return, and that has not yet been received. USG and National have both made their replies.

We would like again, as a matter of orderly presentation, to get those things together and organized, and I think we can put them before the Court in a very few minutes at the beginning of the week of April 11th.

Justice Stephens: Even if there are stipulations of genuineness and stipulations as to the facts, of course there ought to be some showing, as each exhibit is introduced, of its relevancy and materiality under the issues, so we will know the purpose that it occupies in the case.

Mr. Steffen: Yes, your Honor, so there may be an opportunity for objection, and a ruling thereon.

We also have another matter concerning our notices or requests to produce. If you will remember, on January 19th, at transcript page 2957, we raised the question of whether the defendants would produce certain matters,

5855 and in particular we asked to have each defendant give us the patent markings that they used, or had used, upon their board from 1929 to date. We have already received Mr. Lenci's patent markings, or rather Ebsary's patent markings, and have assurances from Texas that they will supply their patent markings. We also have assurances from Mr. Oliver that Celotex will furnish their patent markings in the near future. In order to get this matter cleared up we would like to have the defendants produce, as promptly as may be, those matters, so that we can clear that up the week of the 11th of April.

Justice Stephens: Can you do that, gentlemen, within the next week?

Mr. Bromley: Yes, your Honor.

Mr. Steffen: I have one other question. We have searched the record and we do not find a definite commitment on the part of the defendants on this matter. If you will recall, when the North Holston plant matter was before the Court, and the question came up of inter-company purchases, at one stage of the discussion I think Mr. Bromley said that he thought they could furnish us with the amounts of board which USG sold not only to Certain-teed, but to other companies. We would like to have those figures, simply for the purposes of showing the substantial quantity of board which was bought and sold between companies. I don't want it specific as to

amount, or as to year, but I would like to have the general amount, and if that could be produced by the 11th of April, we would like it.

5856 Mr. Bromley: That had to do only with metallized board, didn't it, Mr. Steffen?

Mr. Steffen: I think it had to do with all board, because the North Holston plant, you see, was buying their whole production of board, perforated lath, and so on.

Justice Stephens: That was the issue on which the majority of the Court ruled, in the reserved rulings, that you had a right to go into the alleged selling of purchased board, as distinguished from manufactured board, at bulletin prices?

Mr. Steffen: That is right.

Mr. Bromley: Well, I don't remember that we ever received any requests to furnish anything other than the figures with respect to metallized board, and I said then that I would initiate an investigation and see if I could find out what the figures were.

Mr. Steffen: That is right.

Justice Stephens: Do you want to make a request now for the figures on all purchased board?

Mr. Steffen: I should like to make a request now to be furnished with the figures which USG has concerning the sales of perforated lath, metallized board, and ordinary board, to licensees, by USG.

Mr. Bromley: That can only be done by checking the inventories, if it can be done at all.

Mr. Steffen: I don't want to get a precise in-

5857 voice check, which I think would be impossible, but I am very sure that the USG people have records to indicate the rough amounts that they have sold to licensees.

Mr. Bromley: We have no records of rough amounts; the only records we have are the invoices. However, I will look at it again. Now you want all board, is that right, at North Holston?

Mr. Steffen: Generally.

Mr. Bromley: We can't do that. What do you mean by "generally", everything that USG ever sold to another company?

Mr. Steffen: Yes.

Mr. Bromley: We couldn't possibly do that.

Mr. Steffen: All we want is just the ledger showing, which can be gotten up, I think, in very short order, through

the years, of the board sold to National, the board sold to Universal, and the board sold to each of the other companies.

Justice Stephens: Well, if the defendants can furnish it I am sure they will accommodate you. If they cannot, we can't, of course, compel it. It may not be possible to give it in view of the nature of the records and the extensive amounts involved.

Mr. Steffen: There is one other point that I wish to raise, if I may, and that is with respect to Mr. Dowd.

Justice Stephens: I was about to raise that matter myself. That is with respect to Exhibit 233?

5858 Mr. Steffen: Yes, your Honor.

We would like the record to show that we agree with Mr. Bromley that unless we can connect that matter up, we certainly ought not to call Mr. Dowd. All I can say is that we have not yet been able to get the connecting evidence which would justify us in asking to have Mr. Dowd called. If, in the next few days, we get that evidence, so that we feel justified, we will notify Mr. Adams.

Justice Stephens: Very well. Thank you for your frankness in that matter.

Mr. Johnston, do you have some matter to bring up?

Mr. Johnston: Yes, your Honor. Before we recess I want to make an inquiry. If we resume again on April 11th, when will the Court ordinarily take its next recess, if we go right along?

I make this inquiry because I have some other very pressing matters that I would like to readjust when I go home. I suppose, if the Government gets through at the time at which they indicated this morning that they would, that that would take up the week ending with April 14th. I suppose also that it is reasonably apparent to most all of us that at the conclusion of the Government's case there will be some motions filed for involuntary dismissals.

So I was just wondering what the Court's idea would be in considering those, whether the Court would

5859 want the briefs prepared and submitted prior to the argument, and then, after the argument the matter would be taken under consideration and decided before anything further would be done.

It is merely a matter of suggesting a schedule here now so that we may know what to do, both about this matter, and about other matters that we have. Therefore, I raise the question at this time.

Justice Stephens: Well, I don't quite see how it would be possible to fix a schedule. If the defendants are going to file motions to dismiss, and urge them, and in those motions discuss the record in detail, and discuss these questions of law that have been informally debated throughout the case, we would undoubtedly want the aid of written briefs before we determined them. As to how long it would take to argue the motions, or just when the Government's case will end, or when it would be within the proper power of counsel to submit briefs if we require them, I think it is impossible to say, Mr. Johnston. I don't see how we can make any prophesies.

Mr. Johnston: Well, if the case were to go in the same manner that it has been going on, and we would be putting on evidence yet in April, when would the next recess be? Would it be at the 28th of April, and if so how long would that recess last? I assume that we would recess on the 28th of April. In that event, when would we reconvene?

Justice Stephens: There would have to be a
5860 two weeks' session of the Court of Customs and Patent Appeals after that, so we would return here May 15th.

Mr. Johnston: That was particularly what I wanted to know about.

Justice Jackson: That is definite.

Justice Stephens: That is about all we can do, I suppose, at this time, by way of prophecy.

If there is nothing else, then, there will be an adjournment announced until the 11th day of April, at ten o'clock.

(Whereupon, at 10:40 o'clock, a.m., the trial was adjourned until Tuesday, April 11, 1944, at 10:00 o'clock a.m.)

5862 IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA,

Plaintiff,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS,

Defendants.

FILED Oct. 22, 1946, CHARLES E. STEWART, CLERK.

Chambers of Judge Harold M. Stephens,
United States Court of Appeals,
Washington, D. C.,
Thursday, April 6, 1944.

The above-entitled cause came on for further hearing at 4:00 o'clock p.m., pursuant to call, before Honorable Harold M. Stephens, sitting as the District Court of the United States for the District of Columbia (pursuant to Section 792, Title 28, U. S. C. A.).

5865 ERRATA SHEET

(Testimony of March 31, 1944.)

Page	Line	Correction
6141	5	Change "License" to "Licenses".
6137	3	Change "expresstion" to "expression".

5866 IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA,

Plaintiff,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS,

Defendants.

Seventh Floor,
Internal Revenue Building,
Washington, D. C.,
Wednesday, April 12, 1944.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

APPEARANCES:

(Same as heretofore noted.)

5867 PROCEEDINGS

Justice Stephens: In the last day's transcript, there was a small change at page 6141, line 5—the word "Li-

cense" at the end of the line should be in the plural, "Licenses".

Have counsel any corrections to suggest?

Mr. Bromley: May it please the Court, at page 6137, in the third line, there is another slight change. The word "expression" is misspelled in Justice Jackson's statement.

Justice Stephens: That change may be made.

Does the Government have any corrections?

Mr. Steffen: No, Your Honor.

Justice Stephens: Call your next witness.

Mr. Steffen: Mr. Ingberg.

Thereupon, S. H. INGBERG, called as a witness for and on behalf of the United States, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Steffen:

Q. Will you state your full name, please, Mr. Ingberg, for the record? A. S. H. Ingberg,—I-n-g-b-e-r-g.

Q. And what is your address, Mr. Ingberg? A. 7018 Hampton Lane, Bethesda, Maryland.

5868 And you are associated with the Bureau of Standards? A. Yes.

Q. How long have you been with the Bureau of Standards? A. Since 1914.

Q. What are your duties out there, Mr. Ingberg? A. I have charge of the fire resistance activities tests.

Q. Would you state briefly what those consist of? A. They consist in tests and standardization of tests relating to the fire resistance and fire hazard of materials, fire prevention, tests and standardization of requirements for equipment for detecting and extinguishing fire.

Q. Along in the period 1930 and 1931 and 1932, did you make any tests concerning gypsum board, fire tests, I mean? A. Yes.

Q. And can you state what tests you made at that time? A. In the period—

Q. (Interposing) Let's say 1930 to 1931? A. I will have to refer to my notes to get the dates right.

In the period 1930-1931, we made four tests with plaster on plain gypsum lath.

Q. By "plain", you mean not perforated? A. Not perforated.

5869 Q. Did you subsequently make some tests on perforated lath? A. Yes.

Q. Did you ever make any tests on perforated lath for the United States Gypsum Company? A. Yes.

Q. And for any other companies? A. Subsequent to the tests for the United States Gypsum Company, we made tests of the products of the National Gypsum Company and the Schumacher Wall Board Corporation.

Q. Going back to these tests in 1930 and 1931 on unperforated lath, did you ever make a report concerning those tests to a committee known as the C-11 Committee? A. Well, it was not a formal report. The results were discussed, I think, at a committee meeting.

Q. At about what time was that? A. I think that was in the fall of 1931.

Q. November 20, 1931? A. I think so.

Q. Did the tests on unperforated lath show that it could pass the one-hour fire test?

Mr. Bromley: I object to that as immaterial, and incompetent if the results of the tests were in writing. But I don't see what the materiality of that is to this case.

5870 Mr. Steffen: I offer it simply preliminarily. I wish to establish simply that the tests upon unperforated lath did not pass the one-hour fire test, and I will go on from there.

Justice Stephens: You mean all unperforated lath?

Mr. Steffen: The tests that Mr. Ingberg made.

(The Justices conferred.)

Justice Stephens: Perhaps I misunderstood you. Does this questioning go to perforated or plain lath?

Mr. Steffen: Plain lath.

Justice Stephens: I misunderstood you. I don't see the materiality of that.

Mr. Steffen: Simply as background to make a comparison between plain and perforated.

Mr. Bromley: If it has any materiality, we concede that plaster on plain lath did not pass the one-hour fire test.

Justice Stephens: If that is conceded, it takes that matter out of issue, and you don't need to make any proof.

Mr. Steffen: I would like to ask one further question.

By Mr. Steffen:

Q. How close did the unperforated lath come to passing the one-hour fire test?

Mr. Bromley: I object to that as immaterial, and also as

incompetent because calling for a conclusion.

5871 (The Justices conferred.)

Justice Stephens: Two of the Judges don't seem to see the materiality of it. If it is conceded that it didn't pass, what difference does it make, Mr. Steffen, whether it failed by a large or small measure, whether it got an A, B or a C?

Mr. Steffen: Well, I will go on from there, if I may.

Justice Stephens: Very well. Objection sustained.

By Mr. Steffen:

Q. You stated, Mr. Ingberg, that you made tests of the Schumacher board. Can you give us the dates? A. The dates?

Q. If you please, yes. A. Well, we made a number for Schumacher, following the other tests. I have the record of the four latest tests here.

Q. All right, can you testify from your own recollection as to when those tests were made? A. The first one I have a record of here—there were two, I think, before that—was May 20, 1936. That was a board that had both indentations and holes.

The next test was on September 9, 1936, also on a board with both indentations and holes.

The next test was on November 24, 1937. That board had holes only.

The final test was made on March 17, 1938, on a

5872 board with holes only.

Q. Now, will you describe the size and arrangement of the holes in the board? A. In the last two tests, or in the last test?

Q. In the fourth test merely. A. In the which?

Q. In the March 17th test.

Mr. Bromley: I object to that as immaterial.

Justice Stephens: Read the question.

(The record was read by the reporter.)

Justice Stephens: What is the point of your objection to that, Mr. Bromley?

Mr. Bromley: I don't understand what materiality it has to any charge in the complaint. Our patent was issued in 1933. Here are tests of another type of board in 1936, 1937 and 1938. I don't see what difference it makes whether they

passed the test or whether they didn't pass the test, whether they were patented or whether they weren't patented.

Justice Stephens: The theory that I thought you were introducing this evidence on, Mr. Steffen, was that if there were types of board, other than that licensed to the defendants in the instant case, which were equally satisfactory so far as the fire test was concerned, that it was some evidence of subterfuge that the defendants took out licenses on the perforated lath from United States Gypsum
5873 Company. Now if that is your theory, what materiality is there in going into these fire tests several years after the licenses were taken out?

Mr. Steffen: The first point is that the licenses were taken out in 1936, at different dates during that year. They were offered in 1936, and they were offered in 1938, a gratuitous license was offered in 1938.

The second point is that whether the Schumacher people finally got around to having their board tested until 1936 or not is more or less beside the point. They were making a board, as Mr. Tice testified last time, as early as 1924, which was perforated. So that there was a perforated lath on the market at the time which, as it is shown, in 1936 passed the one-hour fire test.

Justice Stephens: But if the defendants didn't know at the time they first took out these licenses that there was other board available which it was known would pass the fire test, what is the relevance on the subterfuge charge?

Mr. Steffen: I don't think it had passed the one-hour fire test until March 17, 1936—

Mr. Bromley: (Interposing) Do you mean 1938?

Mr. Steffen: March, 1938, yes.

The point I want to make on relevancy and materiality is that this board was on the market as a perforated lath from 1924 on. It was open to anybody to make a
5874 perforated lath certainly as late as 1938, and in fact earlier than that, because the National, I think we will show this morning, were making a perforated lath which probably did not come within the terms of the Roos Patent, at least it has been sold and has not carried a Roos Patent number.

We contend that the fact that there were at least two other forms of lath available to the industry at all times, which were shown in 1938 to be capable of passing the fire test, although they hadn't been shown to be capable of passing the test in 1936, is evidence from which the Court can

infer that the defendants did not have to take out a license under USG, with price fixing, in order that they could make a perforated lath which would pass the one-hour fire test, or any other test; and that therefore, it is open to the Court to infer that their primary interest was, as I think we have shown some evidence upon, to fix prices and to organize the industry upon the basis called for in the license under USG Patent No. 1,938,354, which is the perforated lath patent.

The criticism, I think, goes to the weight—

Justice Stephens: (Interposing) You have already shown by the testimony of the witness who was here at the last session, from the Schumacher Company in California, that there was another type of perforated lath on the market.

Mr. Steffen: That is right.

5875 Justice Stephens: That has already been shown. This witness isn't called to prove that. This witness is called to prove that there was a fire test on that board in 1938.

Now Mr. Bromley's objection, as I understand it, is that your charge of subterfuge is that at the time these licenses were taken out in 1936, the defendants were aware that other types of board, equally useful so far as fire tests were concerned, were on the market. Now this witness' testimony is after 1936, and I don't see the relevancy or materiality of it on that particular issue of subterfuge.

Have you anything else you want to say, Mr. Bromley?

Mr. Bromley: Except only this, may it please the Court, I don't think Mr. Steffen is correct in his summary of Tice's testimony. All Tice said was that never, prior to the time our lath came out, had they ever made a lath like ours. They had made some with indentations and some with much smaller holes, but they never made anything like ours until after we had gotten the patent, and we notified them of the infringement and they stopped.

Mr. Steffen: I don't think that is correct, strictly. That has only to do with one or two carloads, and had to do with the 3/4 inch hole.

I think the whole question goes back simply to relevancy—I mean to weight.

Justice Stephens: Of course it does—to relevancy.

5876 If you will permit me to say so, it seems to me that you don't really speak to the Court's trouble. The trouble that I have with the evidence that you are now offering is not the general theory of relevancy on

which you are offering it. We have already ruled that you are entitled to show, if you can, that there were other types of perforated lath on the market similar to that being manufactured by the defendants. But this witness is called to prove that in 1938, the lath which he is now testifying about—that of the Schumacher Company—would pass a fire test. Mr. Bromley objects that regardless of this question of subterfuge, that in 1938 its passing a fire test is irrelevant to the state of mind of the defendants in 1936. How could they have known, in 1936, that it would pass a fire test in 1938?

Mr. Steffen: The argument is—and I think the whole trouble is with weight—the argument is that had they made any investigation, had they made any experimentation of their own, they might have ascertained whether or not an unpatented board would have passed the one-hour fire test. Instead of that, they chose to take the course which USG offered to them.

I want to make a second point which I think is more conclusive. Those initial license agreements were signed in 1936. In 1938, USG, in effect, withdrew those licenses, cancelled them, and offered in their place a so-called
5877 gratuitous license. Those licenses were offered in September, 1938, after the time when the Schumacher board had passed the one-hour fire test and after the time when the National board had passed the one-hour fire test. And our assertion as to those agreements which were entered into in September, 1938, is that they were designed primarily and almost exclusively for the purpose of writing back into the basic agreements this perforated lath patent as an additional support for price fixing, and a number of the companies signed those agreements. That is a matter of record. We have introduced them as several of the early exhibits.

Now this testimony would indicate, certainly as respects the gratuitous licenses, that their purpose was not primarily to get the USG patent because they wanted the patent, because they had to have it, but because of the fact that it did give them additional support for their price fixing and tended to promote harmony in the industry.

Justice Stephens: Those are two new points that have been made, Mr. Bromley. Will you reply to those if you care to?

Mr. Bromley: As I understand the first point, he says that a number—I think there were three companies—took

gratuitous licenses subsequent to March, 1938. I think that is right, Newark, Certain-teed and Ebsary took gratuitous licenses subsequent to March, 1938.

5878 Now there isn't any evidence that prices were fixed under those gratuitous licenses. There are no perforated lath price bulletins under those gratuitous licenses, as I understand the state of the record.

Justice Stephens: Mr. Steffen's contention is that that is some evidence that the defendants were using the perforated lath license to give general support to the price fixing on board under other licenses; and he also makes the point that there is some relevancy in the 1938 test, even if the licenses were granted in 1936, in that if the defendants had chosen to investigate in 1936 they could have found out that the Schumacher board would have passed the fire test in 1936 as well as in 1938, and the fact that they didn't investigate is some evidence that they weren't interested in anything except price fixing.

The Court will overrule the objection. It seems very remote, Mr. Steffen, even as to weight, but it may have some slight relevancy, and consequently we will hear it.

By Mr. Steffen:

Q. The question, Mr. Ingberg, was to describe the size of the holes and the arrangement of the holes in the Schumacher board. A. In the last test on March 17, 1938?

Q. That is right. A. There were 48 holes, 13/16

5879 inch in diameter. I have a sketch of it. They sort of staggered—

Justice Stephens: (Interposing) There is one point I ought, in fairness to the defendants' objection, perhaps have gone into. I think you objected also on the ground of competency. Do you wish to raise the question of the propriety of the witness testifying orally rather than offering these records?

Mr. Bromley: Yes, if there is a report that is in writing, I think we ought to have the report.

By Mr. Steffen:

Q. Is there a report in writing on this test of March 17th? A. The report is in writing. I haven't it here.

Mr. Bromley: Then I move to strike out the testimony so far given with respect to the test.

Justice Stephens: I don't see any escape from the propriety of that objection. If this report is in writing and is available to the Government, and could have been brought

here, we ought to have it rather than the witness' recollection.

Justice Jackson: Have you the report there?

Mr. Steffen: I think so.

Justice Stephens: The motion to strike is granted, but you may reexamine the witness on the basis of the actual report, Mr. Steffen.

5880 By Mr. Steffen:

Q. I show you what purports to be a technical report of building materials for use in the design of low-cost housing—

Mr. Johnston: (Interposing) What is the number of it?

Mr. Steffen: It hasn't been numbered yet.

It will be marked Government's Exhibit 606.

(The document referred to was marked as Government's Exhibit No. 606 for Identification.)

By Mr. Steffen:

Q. I ask if that is a report, on pages 20 and 21 thereof, concerning the tests with regard to which you have just testified? A. This report is entitled TRBM No. 8, issued by the National Bureau of Standards. It gives a summary of fire tests of wood and metal frame partitions made up to a certain date.

Q. Now, Mr. Ingberg, referring to this test of March 17, 1938, do you find that in that report? A. From the standpoint of the test of March 17, 1938, I don't think this report has any more status than the notes I have here before me, taken from the original report, for the reason that this report, as mimeographed and approved by the Bureau of Standards, was issued prior to March 17, 1938,

5881 and the tests of the Schumacher lath, Nos. 120 and 123, were made subsequent to that time, and they are written in here, typed in, subsequent to that date. If you want to accept it on that basis—

Justice Stephens: (Interposing) If the witness has material in his own hands, in writing, you may examine him on that, if that has some official basis or if he made it, but it should be disclosed to the defendants.

By Mr. Steffen:

Q. Did you make that notation? A. Yes, the notation in the report here was made by me from the tests.

Justice Stephens: Did you make up the original report?

The Witness: Yes.

Justice Stephens: And you added that insert to it?

The Witness: It was added subsequently.

Mr. Bromley: Might I, with the Court's permission, ask this question?

Justice Stephens: Yes.

Mr. Bromley: There is a written report of the tests of March 17, 1938, prepared by you, isn't there?

The Witness: Yes.

Mr. Bromley: And you haven't that in the court room at all, have you?

The Witness: No, sir.

5882 Justice Stephens: Where is that, Mr. Ingberg?

The Witness: I didn't bring it, we have it in our office. I didn't know it would come up this morning.

Justice Stephens: You couldn't be expected to know that. Counsel should have informed you as to what you were to bring here.

By Mr. Steffen:

Q. I show you what has been marked as Government's Exhibit No. 607, which purports to be a report BMS71, and particularly refer you to pages 20 and 21 thereof, and ask you if that is the report that you have in mind?

(The document referred to was marked as Government's Exhibit No. 607 for Identification.)

A. This is our published report, BMS71—Fire Tests of Wood and Metal Frame Partitions, issued May 12, 1941, as a Bureau of Standards publication. That contains all tests made with perforated gypsum lath, as well as all other plaster bases; and on page 20 thereof, we have the results of the tests in question made on March 17, 1938, of the Schumacher Wall Board Corporation's perforated lath, which were of the lath that I described to you, having—

Mr. Bromley: (Interposing) Just a moment, please. This still isn't the written report about which I asked you, is it?

5883 The Witness: I might say that it is a published report based on the written reports. It has gone through the editorial process at the Bureau of Standards to make certain that it conforms with all the preliminary reports that were issued on these tests.

Mr. Bromley: But isn't there a very full, carefully prepared, written report of the tests of the Schumacher board which were made on March 17, 1938—isn't there such a thing?

The Witness: There is.

Mr. Bromley: And you do not have it in court, do you?

The Witness: No.

Mr. Johnston: I couldn't get his answer.

Justice Stephens: He said no, Mr. Johnston.

Mr. Steffen: Well, if there is objection, it is perfectly possible for us to get the written report, and the notes from which—

Justice Stephens: (Interposing) The Court would appreciate it, Mr. Steffen, if the Government wouldn't waste time the way it has been wasted this morning. It is obvious that this material which has been offered so far, if it is met with an objection as to competency, isn't competent under the best evidence rule. We have been in recess for a week, and I should think the Government could have gotten the originals and have had them here.

5884 Mr. Steffen: Well, I would like to ask to withdraw the witness at this time, and we will call another witness.

Justice Jackson: Can't you telephone for them and have them brought down by messenger while you put on another witness?

Mr. Steffen: We will attempt to do that.

Justice Stephens: Since the Court has ruled in favor of the Government that this material is relevant, wouldn't it be possible for counsel to have an informal conference—and save the time of this witness, from the Bureau of Standards, having to make two or three trips here—as to what material he has, and have him bring in all that either side wants?

Mr. Steffen: I don't think there is any real question on the matter of the tests.

Mr. Bromley: Well, you see, these are confidential, I have never seen them, I don't know what is in them. We have never been permitted to look at them.

Justice Stephens: Then we will have to excuse you, and we will take a few minutes' recess, informally, remaining in the court room, and you may consult with Government counsel as to what you are to bring here; and then either send for it or bring it back. We are sorry to take your time, but we have to have the originals here. We try to be scientific here, as well as in the Bureau of Standards, when it is insisted upon.

5885 The Witness: Judge, what you will get is a copy of the original report. The original report, of course, has gone out.

Justice Stephens: Gone out to whom?

The Witness: To the Schumacher Wall Board Corporation, they get the report because they were sponsoring the tests. What you will get is a carbon copy of the report, that will have the Director's stamp on it; or we can probably have the Director verify the stamp or sign it, if that is what you want.

Mr. Bromley: I make no point of that.

Justice Stephens: We are not interested in formalities. All we want to get is either the original report or a dependable copy of it.

The Witness: Yes, sir.

Mr. Johnston: If the Court please, may I inquire, since counsel for the Government had the Schumacher people here as their witness, maybe counsel has that original report. I would just like to know.

Mr. Steffen: I will say that we do not have that, Your Honor.

Justice Stephens: Very well.

(Witness temporarily excused.)

(Short informal recess.)

Mr. Steffen: Mr. Stromquist.

5886 Thereupon, WALTER G. STROMQUIST called as a witness for and on behalf of the United States, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Steffen:

Q. State your full name, please, Mr. Stromquist? A. Walter G. Stromquist.

Q. And what is your address? A. 599 Hawthorne Street, Glen Ellyn, Illinois.

Q. And who are you connected with now, Mr. Stromquist? A. The Masonite Corporation, Chicago.

Q. Were you at one time connected with Universal? A. That is correct.

Q. At what time? A. From September, 1925, to February, 1931.

Q. February, 1931? A. That is correct.

Q. And after that, were you connected with the receivership for the Universal Company? A. The receivership was pending while I was with them.

Q. During the period that you were with them, what was your office? A. I spent the first two and a half
5887 years in Chicago, and the balance of the time in New York as Eastern Sales Manager.

Q. So throughout the period, you were Eastern Sales Manager, is that correct? A. Not for the first two and a half years.

Q. Except for the first two and a half years? A. Yes.

Q. And did that comprise some period during which the company was in receivership? A. Yes, sir.

Q. And do you know just what year it was when the receivership occurred? A. I can't recall the date that it started, Mr. Steffen, but it was pending when I left.

Q. Now it is in evidence, Mr. Stromquist, that your company was a licensee under the United States Gypsum Company patents—are you familiar with that? A. In a general way, yes.

Q. Did you attend, at any time, any licensee meetings? A. Oh, I think I attended probably two.

Q. And can you state where they were held and who was present? A. In Chicago.

Q. At about what time? A. I believe in 1927 or 1928, I can't say exactly.

5888 Q. 1927 or 1928? A. Yes.

Q. Now, can you tell us who was present at either one of those meetings? First, who represented USG? A. Mr. Henning was generally there, with counsel.

Q. Who was his counsel? A. Usually John MacLeish.

Mr. Bromley: I move that that answer be stricken out unless he actually recalls that one or both of these gentlemen were present at one or both of the meetings of which he speaks. All he said was that they were usually there.

Justice Stephens: It may go out.

By Mr. Steffen:

Q. Can you recall whether or not Mr. Henning was present? A. Yes.

Q. Can you recall whether or not Mr. MacLeish was present? A. Yes.

Q. What, if any, other companies were represented, and by whom? A. The Atlantic Gypsum Company.

Q. Who represented them? A. Mr. Fuller.

5889 Q. And anybody else? A. That is all I recall.

Q. Was there anybody from Texas? A. Mr. Sam Gloyd.

Q. Do you recall his having been at one of these licensee

meetings? A. I am quite sure that he was present at one meeting.

Q. And was there anyone present from Beaver? A. I don't recall.

Q. Do you know Mr. Blagden? A. Mr. Gus Blagden, yes.

Q. Was he perhaps present? A. Not at the meetings that I attended.

Q. Did you know Warren Henley? A. Yes.

Q. Could you say whether or not he was present? A. I don't recall his presence.

Q. Who represented Universal besides yourself? A. I was there alone at one meeting, and I think Mr. Holland, Eugene Holland, was present with me at the other meeting.

Q. Now during this period of 1927 and 1928, did you receive price bulletins, did Universal receive price bulletins from USG? A. Yes.

5890 Q. Will you state, if you can, what the discussion was at your licensee meetings, at these two meetings that you remember? A. Principally dealing with the development of products, possible improvements in products, particularly with respect to Rocklath, or gypsum lath, commonly known as gypsum lath.

Q. What was the discussion, Mr. Stromquist? A. The general over-all plaster base picture, as it were, quoting the potential figures, quoting figures on wood lath sales, metal lath sales, as gained from Government documents, and citing the volume of plaster base business available to the industry if the product were properly sold and promoted; educational work done with architects, engineers, builders, contractors, dealers, and everyone interested in the field.

Q. What, if any, discussion was there as to the prices of the Rocklath or gypsum lath that would be sold? A. I don't recall any particular discussion of prices except as someone may have asked for an explanation of a bulletin that may have been issued, an interpretation of a bulletin that may have been issued.

Q. What were price conditions at this time, Mr. Stromquist, in the industry? A. Badly demoralized.

5891 Q. And will you describe what you mean by "badly demoralized"? A. If you know what I mean by price cutting and price wars, that is about the broadest way to explain it. You never knew from day to day what you were going to meet with in the way of new and lower prices. You couldn't be sure when you walked into the office of a retail lumber dealer just what price he had been quoted, what price he was paying. The market was extremely competitive.

I know we, at Universal, always tried to get the longest price possible, and we might ask a man $25 and find out that he was buying it for $22 and $23, and then we would have to meet the competition.

Q. Was there any discussion of such market conditions, that you recall, among the licensees? A. In the licensee meetings?

Q. Yes. A. No, sir.

Q. Well, you, as Eastern Sales Manager, had charge of what territory, Mr. Stromquist? A. I would say all the Eastern territory as far West as Cleveland, and down to the Carolina line.

Q. And among your customers, can you name any around Oakfield? A. Around Oakfield?

5892 Q. Yes. A. The Oakfield Gypsum Products Company. We had some lumber dealer customers there, too. I can't remember their names at the moment.

Q. Did you also sell to the Paragon companies? A. The Paragon Company at Syracuse, New York, yes.

Q. And did you know— A. (Interposing) And other companies in Syracuse.

Q. Did you know the American Hardwall Plaster Company? A. Yes; Utica, New York.

Q. Who did you know in the Paragon of Syracuse? A. Emil Hansen.

Q. Did you know him to be connected with Oakfield? A. Yes.

Q. Did you know Mr. Tom Eldred? A. Yes.

Q. And who was he connected with? A. American Hardwall Plaster Company, Utica, New York.

Q. Was he also connected with Oakfield? A. Yes, as a stockholder. I shouldn't say that he personally was a stockholder, I would like to correct that, but it is my understanding that his company owned part of the stock in Oakfield Gypsum Products Company.

Q. And did you know the company of which Mr.
5893 Merriman was a member? A. Mr. E. L. Merriman was with the Paragon Plaster & Supply Company at Scranton, Pennsylvania.

Q. Now I would like to show you Government's Exhibit No. 560, Mr. Stromquist. That is an excluded exhibit.

(Government's Exhibit No. 560 handed to the witness.)

By Mr. Steffen:

Q. Will you examine the signature, Mr. Stromquist? A. Yes, sir, that is my signature.

Q. Will you please read the letter to yourself? A. Yes, sir, I have read it.

Q. Was it your practice, Mr. Stromquist, to send prices to the Paragon people, and also to Oakfield, at which they should resell board?

Mr. Bromley: I object to that as incompetent because calling for a conclusion, in so far as the phrase "at which they should resell board" is concerned; and I object to it as immaterial in so far as the Paragon companies are concerned, there being no charge of the fixing of resale prices by Paragon.

Mr. Steffen: I will leave out the last portion of the question.

Justice Stephens: Rephrase the question so as to leave out the Paragon companies.

Mr. Steffen: I would feel that I would have to
5894 leave in the Paragon companies, Your Honor, because of the fact—which I think the Court is fully familiar with—that this is an involved situation, and we are not offering the answer to prove that they were attempting to fix or control the resale prices of the Paragon companies. We would like simply to bring that in as part of the general picture.

Justice Stephens: I see your point. We will not consider the exhibit, if received, or the testimony, if received, as tending to prove resale price fixing by the two Paragons or American Hardwall, because that is not charged in the complaint. You are entitled to go into the question of whether or not this witness was attempting to fix resale prices of Oakfield, provided you can competently prove that.

What is your objection as to competency, Mr. Bromley?

Mr. Bromley: That was only because of the last part of his question.

Justice Stephens: Very well, proceed.

By Mr. Steffen:

Q. I want to direct your attention, Mr. Stromquist, to the fact that you said that you were selling both Paragon and Oakfield during the period 1927 and 1928, and I ask you if it was your practice to send dealer's prices to them, to both companies? A. Yes, we sent them to Oakfield and to the three other companies, Paragon, American Hard-
5895 wall and Paragon Plaster & Supply Company.

Q. How did you send them, Mr. Stromquist? A. How did we send them?

Q. By mail? A. By mail, yes.

Q. Could you tell us what this letter, Government's Exhibit 560, means in that connection?

Mr. Bromley: I object to that as incompetent because calling for a conclusion. The letter is not in evidence. Counsel is asking for an interpretation of it.

Mr. Steffen: I will offer the letter in evidence, Your Honor, but I think the Court will remember that the letter may be or might have been regarded as ambiguous, and I think Mr. Bromley so regarded it at the last time.

Justice Stephens: The letter was excluded before, as the Court remembers, first because at that time there was no identification of Mr. Stromquist's signature; and, second, because we were of the view that the letter did not, on its face, apply to the resale prices of Oakfield as distinguished from the two Paragons and American Hardwall, and Emil Hansen himself testified that he didn't regard the letter as applicable to Oakfield.

Mr. Steffen: I think that doesn't quite state it, Your Honor.

Justice Stephens: That is what I understood.

5896 Please correct me if I am incorrect.

Mr. Bromley: You are not incorrect, if the Court pleases. The letter was identified at page 5283, and the objection as to competency was overruled. It was excluded at page 5374 on the ground, as Your Honor has said, that the witness testified that it did not apply to Oakfield, but it was understood by him to apply to the Paragon company, and if it did so apply to Oakfield he paid no attention to it.

Mr. Steffen: Let me get that last clear, because Mr. Bromley has made the point that I want to make, that it applied to Paragon because it was addressed to them; and that it also applied to the sales to Oakfield, but that so far as he was concerned, if it meant to control the price at which Oakfield sold to Paragon, then they disregarded it.

Now we are going at this matter from the other end. We are asking Mr. Stromquist what he meant by quoting prices in the way that he did in Exhibit 560, and what Mr. Hansen meant or understood was an entirely different matter. What we are now offering to show is what the writer of the letter understood when he wrote it, and that is all that is material.

Justice Stephens: I am inclined to the view—if my colleagues disagree with me they will please speak for themselves—that the objection to this particular question as

phrased is well taken. You are asking the witness
5897 to do something that the Court has got to do, say what the letter means on its face, so far as this question is concerned. But I think you are entitled to show, if you can, by this witness, what the dealings between the parties were, what the intention of this witness for Universal was, and what form of letters he sent as intended by him to express that intention, so as to convict him, if you can, of an attempt to fix the resale prices of Oakfield, and to bring to the Court's attention the course of dealings between the two companies, the circumstances covering the transaction.

Have you any objection to that, Mr. Bromley?

Mr. Bromley: No, sir; I will go farther, if the Court please. It seems to me that the question he ought to ask him is whether this witness intended this as a direction to Oakfield.

Justice Stephens: That is what I thought you ought to ask, myself, Mr. Steffen.

Objection sustained to the question as asked, but you may ask the question just suggested.

By Mr. Steffen:

Q. You have read Exhibit 560, Mr. Stromquist, and you testified that you were selling board to Oakfield. Now was this letter, Exhibit 560, intended as a direction to Oakfield, and I refer particularly to the next to the last paragraph?

A. This particular letter was intended to cover only
5898 Paragon at Scranton, Pennsylvania, who had the privilege of buying for Oakfield, if they so chose, as as well as buying for their plant at Scranton and as well as buying for resale to their dealers in their trading area. Now somewhere in the files there should be another letter to the Oakfield Gypsum Products Company, if I may make that statement.

Q. Didn't you tell me in the office, Mr. Stromquist, that you, on occasion, wrote to Paragon for purposes of quoting both to Paragon and to Oakfield? A. May I take a moment and explain the relationship between Universal and Oakfield, if it is permissible?

Q. I should like to hear that. A. The Oakfield Gypsum Products Company at Oakfield, New York, was a manufacturer of calcined plaster products, primarily. That company was owned by the Paragon Plaster Company of Syracuse, New York, the American Hardwall Plaster Company at Utica, New York, and Paragon Plaster & Supply Com-

pany of Scranton, Pennsylvania. Just how the stock was split among the three companies, I wouldn't undertake to say, I don't know, but I do know that the entire ownership rested in those three companies.

The Paragon Plaster Company at Syracuse, the American Hardwall Plaster Company at Utica, and the Paragon Plaster & Supply Company at Scranton, were really in three different types of business. By that I mean
5899 classifications of business. At each point they functioned as a wholesaler or jobber of building materials to dealers in their respective trading areas. In their local markets, Syracuse, Utica and Scranton, they conducted a retail business, selling to contractors, builders and consumers, as well as to dealers who would buy from them in their home markets. Then they also acted in the capacity of manufacturers, since at each point they had what is commonly known as a mixing plant, a sanded plaster mixing plant. They were supplied their stucco, or plaster of Paris, from the Oakfield Gypsum Products Company at Oakfield, New York. The stucco was shipped to the three points and there mixed with the sand, retarder, and hair fiber, plus other ingredients, to form a finished product known to the trade as sanded plaster. That was sold by them to dealers and to contractors.

We, in Universal, were very intimately acquainted with the entire relationship, Oakfield and these other companies. It is my own personal opinion—

Mr. Bromley: (Interposing) I object to his opinion if the Court pleases.

Justice Stephens: State the fact and state your dealings, don't state your opinion.

Mr. Bromley: I don't see the relevancy of this answer, anyway, and I move to strike it out.

Justice Stephens: It has all been in the record
5900 before, through other witnesses, hasn't it?

Mr. Bromley: Yes.

Justice Jackson: As I understood it, the witness was going to explain why he made certain answers to you in your office this morning, and this was a voluntary statement to explain why he made them. I think on that theory he ought to be permitted to go on, without expressing an opinion.

The Witness: That is what I was leading up to.

Justice Stephens: Proceed, then. The motion to strike is denied.

The Witness: Our dealings were principally with Mr. Emil Hansen. Now when we dealt with him, we dealt both with respect to Oakfield Gypsum Products matters and Paragon Plaster Company of Syracuse matters. There were times when we would deal with Mr. Tom Eldred, of the American Hardwall Plaster Company, and we would finish any matters we had pending dealing with the American Hardwall Plaster Company business, and at times discuss matters concerning Oakfield. Since he may have been in New York, he would represent Oakfield, too, for Mr. Hansen. Likewise, there were times when we would deal with Mr. E. L. Merriman on matters concerning Paragon, and he would discuss matters affecting Oakfield.

Justice Jackson: That is Paragon of Scranton?

The Witness: That is correct.

Our letters were not always directed to each of the
5901 four companies, if I may put it that way. Most generally they were, but there would be times when we would write a letter to, let us say, Paragon Plaster Company at Syracuse, and we would send copies to Scranton and to Utica for their information, and they would accept those letters as applying to them as well.

It was probably poor business to handle it that way, but we knew all those men so well, and the relationship was so close that there was no question of responsibility, merely the intent of carrying a message to them and getting information to them, and they accepted our handling of the correspondence in that manner.

All of those companies had the right to buy for their respective markets, Syracuse, Utica and Scranton. They also had the right to buy for Oakfield, if they so chose, and we would sell them for delivery at Oakfield.

Justice Stephens: We will take the morning recess at this time.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

5902 Justice Stephens: Proceed, gentlemen.

By Mr. Steffen:

Q. You were telling us just before the recess, Mr. Stromquist, concerning the three parent companies of Oakfield—the two Paragon companies and the American Hardwall Plaster Company. I want you now to state what your deal-

ings with Oakfield were. I think you testified that you sold to Oakfield. Did you furnish them at any time with dealer prices? A. We wrote some letters to Oakfield, quoting them prices and which applied for their own purchases, and for delivery to Oakfield only.

Q. And did you quote them dealer prices at which you sold such board? A. I beg your pardon?

Q. Did you quote Oakfield dealer prices from time to time at which you sold your dealer trade? A. No, we did not. We generally had a special price to Oakfield for Oakfield delivery.

Q. That is your price to Oakfield. I mean—did you also give them the price at which you were selling to dealers? A. I don't recall any such correspondence. I should say this, in answer, if I may, I am quite sure—

Mr. Bromley: (Interposing) I object to a volunteer statement; he has answered the question.

Justice Stephens: The question has been an-
5903 swered. Suppose you ask him another question.

By Mr. Steffen:

Q. I would like to show you what has been marked as Government's Exhibit No. 608.

(The document referred to was marked as Government's Exhibit No. 608, for identification.)

By Mr. Steffen:

Q. This purports to be a telegram—

Justice Garrett: (Interposing) Mr. Steffen, are you going to introduce that other exhibit?

Mr. Steffen: I am not going to offer it at the moment.

Justice Garrett: Will that be offered under Exhibit No. 560?

Mr. Steffen: If it is offered, yes.

Justice Stephens: Is it offered now?

Mr. Steffen: No, your Honor.

By Mr. Steffen:

Q. I now show you what has been marked for identification as Government's Exhibit No. 608, which purports to be a wire from the Universal Gypsum Company to Emil Hansen, under date of July 10, 1929.

(Document was handed to the witness.)

Justice Stephens: Now hand it to defendants' counsel, unless they have seen it.

5904 Mr. Steffen: I think they have already seen it.

Justice Stephens: Have you seen it, Mr. Bromley?

Mr. Bromley: No, I haven't seen it, I don't believe.

Mr. Steffen: They saw it in the Hansen exhibits.

Justice Stephens: Perhaps they would like to refresh their recollection.

(The document was handed to the defendants' counsel for examination.)

Mr. Bromley: Is there a question pending, may I ask?

Mr. Steffen: No.

Justice Stephens: The witness was just asked to read the wire.

By Mr. Steffen:

Q. Are you familiar with Government's Exhibit No. 608, Mr. Stromquist? A. Is that the telegram you just showed me?

Q. Yes. A. I cannot identify that particular telegram, Mr. Steffen.

Q. Does that refresh your recollection as to how prices were furnished to either Oakfield or Paragon? A. I could say this, that there were times—

Justice Stephens: State whether or not it refreshes your recollection.

The Witness: Yes, it does, your Honor.

5905 Justice Stephens: All right, then state what your recollection is.

The Witness: There were times when we would notify Paragon at Syracuse, and Paragon at Scranton, and American Hardwall at Utica, and also Oakfield, by telegram, of price changes, and prices generally.

By Mr. Steffen:

Q. Now, state to the Court whether that telegram or telegrams of the character you are describing—how they would be addressed?

Mr. Bromley: I object to that as entirely too general.

Mr. Steffen: What I want to get at, Mr. Stromquist is—

Justice Stephens: (Interposing) That objection is sustained, and since the telegram is not in the record, it wouldn't mean anything in the record.

Mr. Steffen: That is right.

By Mr. Steffen:

Q. Did you, on occasion, write or wire to Mr. Emil Hansen, giving him dealer prices?

Mr. Bromley: I object to that unless the writtten communication is produced.

Justice Stephens: That objection is sustained. We have ruled that you can show the course of conduct between these parties with respect to these prices, but this is a very critical matter. You are seeking to establish
5906 resale price fixing by a manufacturing distributor, and if there is written evidence it should be produced.

By Mr. Steffen:

Q. Mr. Stromquist, state whether or not in quoting prices to Paragon you intended, on occasion, that they should also apply to Oakfield? A. Letters written to Paragon Plaster Company at Syracuse, New York, for example, would carry prices applicable to shipments to the Oakfield plant as well as to shipments to Syracuse, or on their orders direct to their dealer trade.

Justice Stephens: What kind of prices do you mean, prices to be paid you, or what prices?

The Witness: Prices to be paid Universal by Paragon at Syracuse. Now, if Paragon elected to purchase for delivery to Oakfield, they could do so on their order form, and the invoice would be rendered to the Paragon Company for such purchase. But that would be on a Paragon order.

By Mr. Steffen:

Q. That is right. Did you have any Oakfield orders? A. Yes, we did.

Q. How did you quote prices to Oakfield? A. At times those prices were addressed to them direct, mailed to their Syracuse office. We did not always do that—it was probably a little bit loose on our part—sometimes we would take whatever prices we named in our letters to
5907 Paragon Plaster Company, for Oakfield delivery, and use those prices in invoicing to Oakfield Gypsum Products.

Q. When Oakfield was buying direct? A. That is correct, on their own order forms.

Q. Now, did you have any arrangement with Oakfield as to whom they might resell their board to? A. No, we did not.

Q. It was open to them to sell to dealers if they saw fit? A. That was their privilege.

Q. And did you ever quote to them the price at which you were selling to dealers? A. I don't recall any such instance for Oakfield. I don't think we ever gave Oakfield any prices that we were selling to dealers at. There would be no object in so doing, Mr. Steffen, for the reason that we never met them in competition, as such.

Q. During what years? A. During all the time I was in New York, for Universal. The competition came from the Paragon companies and the American Hardwall Plaster Company.

Q. Did you know Earl North? A. Yes, I did.

Q. What did you know about him in connection
5908 with Oakfield? A. I know that he was with them for a period, just how long I don't recall. What his duties were, I don't recall.

Q. You wouldn't know, or don't know, whether he sold for Oakfield direct to dealers, or not? A. We never met him in competition, as the Oakfield Gypsum Products Company or as Earl North, as a matter of fact.

Q. I now show you what has been marked as Government's Exhibit No. 609.

(The document referred to was marked as Government's Exhibit No. 609, for identification.)

By Mr. Steffen:

Q. This purports to be a letter of June 3, 1929, signed by Mr. Stromquist, addressed to the Paragon Plaster Company, together with two bulletin enclosures. This was not offered when Mr. Hansen was on the stand, your Honor.

Justice Stephens: Are there photostats of this?

Mr. Knuff: They were furnished to the Court in connection with Mr. Hansen's testimony.

(Copies were handed to the Court.)

Justice Stephens: Mr. Cantor informs me that all of the exhibits of this type were returned to Government counsel.

However, this is the one, is it, dated June 3, 1929, that we are dealing with now?

Mr. Steffen: It is the only one that I think we have,
5909 your Honor.

Mr. Knuff: On the reverse side of the one you have, your Honor, doesn't it say "Judge Stephens' copy"?

Justice Stephens: Yes.

Mr. Knuff: That is the one you handed to me, and I am handing it back to you.

Justice Stephens: Oh, yes.

Mr. Steffen: That is a 2-page letter, and attached to it are Bulletins Nos. 3 and 4, which are referred to in the first paragraph of the letter.

By Mr. Steffen:

Q. Have you examined Government's Exhibit 609, Mr. Stromquist? A. Yes, I have.

Q. And is that your signature? A. That is my signature.

Mr. Steffen: I offer Government's Exhibit No. 609.

Mr. Bromley: I object.

Mr. Steffen: (Interposing) I want to make a statement. Exhibit No. 609 has been identified as a letter written by Mr. Stromquist, and which was also taken from the files of the Paragon Plaster Company, which indicates that it has been received.

We offer it on two grounds.

The first ground is this, that we find here the
5910 Universal Gypsum and Lime Company quoting to Paragon Plaster Company, which we will assume for the moment is simply Paragon Plaster Company and not anything having to do with Oakfield, and telling Paragon Plaster Company what their prices shall be to the dealer trade. Now, there is no question but what the letter, this letter—and in fact, Government's Exhibits 560 and 561—constitute a showing that the Universal Gypsum Company was endeavoring to influence or to control the price at which the Paragon Plaster Company was reselling.

We are not, of course, offering it to show that they were controlling the price of jobbers, for the reason that there is no charge in the complaint to that effect. But we do say that when we have a concern as closely affiliated as was Paragon Plaster Company and the other two parent companies, with Oakfield, and where we find the parties dealing rather informally with one another, and instructing Paragon Plaster Company or the parent companies to

resell at certain prices, which are the dealer prices—in this case, the two bulletins enclosed are taken directly from, or will conform, I call your Honors' attention, to the bulletin, Exhibit 404, which is a United States Gypsum bulletin—now, that, we say, is a showing of facts from which the Court could infer that the Universal Gypsum Company was endeavoring to control not only the price of Paragon, which is admitted practically, but to control the price of the Oakfield Gypsum Products Company
5911 if and when it sold to dealers.

We offer it secondly upon this ground. You will notice in paragraph 2 of the letter that it says, "Please make no price commitments or price guarantees", and language of that sort, in the middle of the paragraph, indicating that this was a rush matter.

Your Honors will note the date, June 3, 1929, which was very shortly after the May 21, 22 and 23 general license agreements had been signed.

We have in evidence already the fact that prices went up during this period. There were a series of bulletins issued. We find here, therefore, the Universal Gypsum Company sending bulletins saying to it, in effect, to beware, that prices are going up. We take that to be an admission on the part of Universal Gypsum Company that they expected prices to advance, and of course their expectations were not disappointed, because prices did advance during this period.

We therefore offer it as an admission on the part of Universal Gypsum Company indicating that prices were likely to, or that they expected prices to, advance during this period in 1929.

That, I think, is very relevant and very material to show that they went into the 1929 meeting with Mr. Avery out in Chicago with the idea of getting higher prices.

Justice Stephens: Do you wish to be heard, Mr. Bromley?

5912 Mr. Bromley: It seems to me, may it please the Court, that the offer of this exhibit comes directly within the ruling of the Court in connection with Exhibits 560 and 561, which ruling was made at page 5374, the exhibits being rejected on the ground that they were immaterial and irrelevant.

I see no difference at all between Exhibit 609 for identification and Exhibits 560 and 561 for identification.

Justice Stephens: We are of the view that the exhibit is

not admissible upon the first theory because it doesn't, on its face, apply at all to Oakfield.

But what do you say with respect to the second theory, that it may be relevant, in the nature of an admission by Universal of an expectation of prices going up at about the time the license agreements were signed?

I think that was not involved in either Exhibit 560 or Exhibit 561, Mr. Bromley.

Mr. Bromley: No, it was not, your Honor.

Justice Stephens: We are inclined to the view that it is admissible on that theory, so far as relevancy and materiality are concerned; in other words, that the objection on the second theory goes to its weight, rather than to its relevancy.

Mr. Bromley: This is offered, then, as an admission by a company not a defendant, on the theory that Universal is a co-conspirator?

Mr. Steffen: That is right.

5913 Mr. Bromley: And an admission that it expected prices to go up after June 3. Well, it seems to me that any such admission is immaterial. Obviously, the sentences to which counsel has called the Court's attention are the usual sentences that any supplier would write to any purchaser who he regarded more or less as an agent, not to make price commitments in the future.

Justice Stephens: Well, I think that that is a matter of interpretation as to its weight, Mr. Bromley.

The Court rules that the exhibit is not admissible on the first theory for which it is offered, to prove resale price fixing by Universal with respect to Oakfield, because it obviously, on its face, does not apply to Oakfield, and the testimony of the witness seems to discountenance its application to Oakfield.

But it is received in evidence on the second theory.

Mr. Bromley: Shouldn't the portion received be limited to the second paragraph of page 1 of exhibit 609 for identification, if that is the theory on which it is received?

Mr. Steffen: I think, in order to comply with the complete evidence rule, as so frequently stated by Mr. Bromley, the entire letter ought to be received.

Justice Stephens: No, the Court will not limit it to that one paragraph, but the letter will be received for that one purpose and on that one theory only, and

5914 is received subject to the usual reservation with respect to declarations of alleged co-conspirators.

(Exhibit No. 609 received in evidence.)

Mr. Adams: May I be heard a moment on that last ruling, your Honor?

Justice Stephens: With respect to Exhibit 609?

Mr. Adams: Yes, your Honor.

Justice Stephens: Yes.

Mr. Adams: Your Honor stated that it was admitted on the theory that it was an admission, and then stated that it was received subject to the usual reservation with respect to declarations of alleged co-conspirators.

Justice Stephens: That is right.

Mr. Adams: I can't see how it could ever be anything but an admission—how could it be a declaration of a co-conspirator?

Justice Stephens: There is no difference between a declaration and an admission so far as the theory of admissibility is concerned. They are both hearsay, and if they come in, they come in as an admission under the exception to the hearsay rule.

Mr. Adams: It would seem to me that that could never be in furtherance of any conspiracy.

Justice Stephens: That is within the reservation. The usual reservation with respect to declarations of alleged co-conspirators is that there must be evidence,
5915 aliunde, the declaration or admission, to prove the conspiracy, and that the declaration or admission must be shown to be in furtherance or execution of the conspiracy.

Mr. Adams: It was my confusion with respect to the use of the word "admission" as distinguished from the word "declaration". I had in mind that there might be a distinction. Perhaps I am wrong.

Justice Stephens: Neither a declaration nor an admission, whichever name you apply, is admissible except as an admission, because otherwise it would be hearsay, and it isn't binding upon the other co-conspirators unless the conspiracy is first shown aliunde the alleged declaration, and unless it is shown to be in furtherance or execution of the conspiracy. All of this evidence is being received as subject to that same type of proof.

Mr. Steffen: I should like to show the witness Exhibit 402.

(The document was handed to the witness.)

Justice Stephens: Were these the exhibits in which the identification of Mr. Stromquist's signature was lacking before, Mr. Steffen?

Mr. Steffen: No. Mr. Lenci did not identify 402. I think he did identify 401.

Mr. Knuff: They were offered in connection with Mr. Lenci's testimony.

5916 By Mr. Steffen:

Q. Have you examined Exhibits Nos. 401 and 402? A. I have.

Q. Can you identify the signature? A. I can.

Q. Is it your signature? A. Yes.

Q. In both cases, as to Exhibits 401 and 402? A. Yes, sir.

Mr. Steffen: I now offer Exhibits 401 and 402 and I want to make a very brief statement on the matter.

Exhibit 401 I think was offered earlier and rejected. I would ask your indulgence to make a further very brief statement concerning it.

Justice Stephens: Refresh our recollection about it, will you? What was the basis of the previous offer and rejection?

Mr. Steffen: The basis of the offer was—or rather the objection to the offer was made by Mr. Bromley on the ground that this was addressed to the Ebsary Gypsum Company and the Ebsary Gypsum Company didn't appear or wasn't listed as a manufacturing distributor, and of course that is perfectly true, and it is not now offered for the purpose of showing that this was an effort to control a manufacturing distributor's prices di-

5917 rectly; that is, that Ebsary Gypsum Company was, of course, a plaster manufacturer at the time, they hadn't yet started to make board, but they commenced making board and never actually bought board from the Universal Gypsum Company, according to the terms of this letter, as I understand it.

Now, we make this contention, that this letter is written by the Universal Gypsum Company to a company which was in the exact category of a manufacturing distributor, as Mr. Bromley has stated, although they were not named as a manufacturing distributor in the bill of particulars for the reason that they never actually became a distributor.

Our contention, therefore, is that if we can show, as here, that the Universal Gypsum Company was writing to a manufacturing distributor and telling the manufac-

turing distributor not only what their prices were but what their terms and conditions of sales were, concerning basing points and the arbitrary weight of board—1850 pounds—and all matters which come within the selling policies of the licenses under the license agreements, we say that that is a showing of facts upon which the Court can infer that the prices of other actually named manufacturing distributors were also being influenced or controlled, in this case by the Universal Gypsum Company or by the defendants generally.

Our second thought, and ground upon we urge the admissibility of the two letters, is that they constitute admissions at this time on the part of the Universal
5918 Gypsum Company, that they were endeavoring to carry out the terms of the bulletins and endeavoring to get others, in this case the Ebsary Gypsum Company, to carry out the terms of the bulletins as respects basing points, as respects the arbitrary weight of the board, and as respects resale prices. And it seems to me that on both those grounds, the two letters should be admitted.

I wanted, as I endeavored to do, to refresh your Honors because it had been rejected on the first ground, although I doubt that it had been perhaps fully presented at that time.

Justice Stephens: I don't recollect your having presented the exhibit on the first ground that you are now arguing, that it is evidence of a course of conduct on the part of one of the alleged co-conspirators. In other words, it is introduced on the analogy of "other crimes" so to speak.

What do you wish to say, Mr. Bromley, if anything?

Mr. Bromley: Exhibit 401 was rejected at page 4019 of the record, and between pages 4019 and 4029, the basis of the ruling is shown clearly, and it was to the effect that Exhibit 401 for identification was immaterial because there was no charge in the complaint naming Ebsary as a manufacturing distributor.

That objection, of course, would apply to Exhibit 402, although Exhibit 402, while mentioned at page 4043 of the record, was never formally offered. But the two documents are obviously in precisely the same class,
5919 and the ruling made as to 401 would apply as to 402.

Now, the new ground on which both of these exhibits are offered is, I assume, as your Honor has suggested, on some theory of "similar crimes".

Justice Stephens: Similar courses of conduct showing a common purpose or design. There is an exception—referring to the analogy of "other crimes"—I think I explained that in Martin v. United States this court has collated the rulings on that subject, and while the general rule is that other crimes or other wrongs are not admissible, there is a series of exceptions within which is included the one where the otherwise collateral matter tends to prove a common design or intent, or course of conduct.

I think Exhibit 401 was not discussed in that category on the previous ruling, was it, Mr. Bromley?

5920 Mr. Bromley: No, it was not. Neither exhibit was discussed in the light of that theory.

The difficulty that I have with that theory is this: I suppose that all would agree that as the Supreme Court said in the Softlite case just yesterday or the day before, it is perfectly lawful for a manufacturer who sells his goods to a purchaser, to say to the purchaser, "Now, I expect that in your resales you will follow my prices; and I tell you now, if you don't I am not going to sell you any more."

The Supreme Court held that in the Colgate case, as modified by the Beechnut case.

And the Supreme Court, in Justice Reed's opinion, reaffirmed, as I read it, the doctrine that a supplier can go a certain extent in trying to see to it that his customer does not undersell him in the market, and the line is between an agreement and understanding that the purchaser will observe fixed resale prices—that is illegal—on the other hand, it is perfectly lawful for the supplier or seller to say, "Now, I am not going to sell you any more if you undersell me and cut my market, and I will tell you in advance, and I will tell you what I expect you to do; I can't compel you to do it or coerce you to do it or have you agree that you will do it."

So that this letter on its face seems to me to be the mere expression of the exercise of a perfectly lawful
5921 right on the part of the Universal; unless this letter was followed up by some agreement or understanding on the part of Ebsary that they would observe fixed prices, then there is nothing wrong about it.

So it seems to me in this situation, even on the new theory, to be immaterial and irrelevant, because it goes to prove—giving it the worst effect possible—merely a course of lawful conduct, and not unlawful conduct.

Justice Stephens: We will receive these two exhibits in evidence under the theory stated by the Court. We think your objections probably go to the weight or ultimate meaning of the exhibits, Mr. Bromley. We do not receive the exhibts as tending to prove resale price fixing by Ebsary Gypsum Company as a manufacturing distributor, because that was not charged, but under the course of conduct theory we will receive these exhibits in evidence as perhaps having some relevancy and materiality, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents referred to, marked as Government's Exhibits Nos. 401 and 402, were received in evidence.)

By Mr. Steffen:

Q. I would like to show you what has been marked as Government's Exhibit No. 403, Mr. Stromquist.

5922 Mr. Steffen: This letter, I think, was never identified.

Will you please hand Government's Exhibit No. 403 for Identification to the witness?

(Government's Exhibit No. 403 for Identification was handed to the witness.)

By Mr. Steffen:

Q. Have you examined Government's Exhibit 403 for Identification, Mr. Stromquist? A. Yes, I have.

Q. And is that your signature? A. That is not my signature, but I recognize it as my signature signed by my secretary at that date.

Q. Is that your letter? A. Yes, sir.

Mr. Steffen: We offer now in evidence, Your Honor, Government's Exhibit 403.

Justice Stephens: On the same theory?

Mr. Steffen: This has to do with a different topic. It has to do with the charge that the defendants conspired, among other things, to influence or control the price of miscellaneous products other than gypsum board. This has to do with plaster. The charge in the complaint is very clear, and this is a letter which is exchanging price information between Universal and National con-

5923 cerning plaster in certain territories, and suggesting that Mr. Burley get in touch with Charley.

Who, by the way, is Charley, Mr. Stromquist?

The Witness: Mr. Charley Henning.

Mr. Steffen: Of the United States Gypsum Company?

The Witness: That is correct.

Justice Stephens: Any objection?

5924 Mr. Bromley: I object to it as immaterial and irrelevant.

Justice Stephens: The objection is overruled; the exhibit is received subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit 403, was received in evidence.)

By Mr. Steffen:

Q. Do you recall the occasion when you wrote this letter, Mr. Stromquist? A. Yes, I do.

Q. Had you had any conversation with Mr. Burley concerning this matter? A. Yes, I did.

Q. What was your conversation—

Justice Stephens: (Interposing) Before you answer that question, is the bulletin attached to that, the sheet following it in these photostats that we have?

Mr. Steffen: Yes, your Honor.

Justice Stephens: Perhaps that should be marked Exhibit 403-A, then, because it is not attached to the other.

Mr. Steffen: Yes.

Justice Stephens: Mrs. Gillette, mark the bulletin as Exhibit 403-A; otherwise it may get lost in the record. And it will be admitted under the same theory as Exhibit 403 and subject to the same reservation.

5925 (The document referred to was received in evidence as Government Exhibit No. 403-A.)

Justice Stephens: Mr. Reporter, will you now read the question to the witness?

(The reporter read the pending question.)

The Witness: As I recall it, Mr. Burley phoned me from Buffalo. He was comparatively new in the plaster business at the time, and he had been making a rather careful study of the plaster business, of plaster prices, having had many reports from various sections of the territory, some reports from salesmen and some advices from dealers, as I recall his saying, and there was quite a wide variance in the prices as reported to him and he was a bit concerned as to what really was the going market price, because of

these wide differences. He was merely making a study to determine what he would do.

He asked me if I had any objection to sending him a copy of the prices that Universal Gypsum & Lime Company had published, and which they had been using on sales of sanded plaster in that territory. I told him I would be glad to send him such a bulletin, which I did.

By Mr. Steffen:

Q. What is the reference to "Charlie", "Charlie" Henning? A. Since my activity was primarily in the Eastern market at the time, and not being intimately
5926 acquainted with conditions in Michigan and Wisconsin and parts of Ohio, I wasn't able to tell him much about our findings in those territories, and I merely suggested that if he cared to talk to Mr. Henning about the situation, he might do so.

Mr. Bromley: On the basis of that testimony, may it please the Court I move to strike out Exhibit 403 and 403-A on the basis of the witness' explanation with respect to the letter in which he has stated clearly that it was merely an explanation to Burley who had requested prices from Universal in a territory with which Mr. Burley was not familiar but as to which Mr. Stromquist was familiar, and a suggestion that he see Henning concerning prices in that territory with which Mr. Henning w.s more familiar than Mr. Stromquist—and all of which concerned the price of plaster.

Justice Stephens: We will be glad to hear you, Mr. Steffen. We are inclined to the view that the testimony of your own witness has now shown that this document doesn't prove what you offered it for. That being true, it ought to go out.

Mr. Steffen: I offered it to show an exchange of price information between the licensees. It is true that very rarely are you able to prove an agreement on the part of anybody that they will abide by or follow exactly the prices that each has furnished the other. But the first step in any conspiracy, practically, to make it effective,
is to supply each other with prices, and that is usu-
5927 ally regarded—and I think it will be by the Court here—as very material evidence.

It is true that Mr. Stromquist's statement concerning it as merely an exchange of information, goes to the weight of the matter—we grant that cheerfully.

Justice Stephens: Well, I am inclined to think you are right about that. The objection goes to the weight. The motion to strike is denied and the exhibits may remain.

Mr. Steffen: We are not clear as to whether we still have some exhibit that has not been ruled upon, or not.

Justice Stephens: Well, if you need a little time to consider this, we can take the noon recess at this time. I notice that Mr. Ingberg has returned. How long is he likely to be on the witness stand?

Mr. Steffen: I will have to talk to him for a couple of minutes before he goes on, anyway.

Justice Stephens: Then we will take the noon recess at this time.

(Whereupon, at 12:07 o'clock, p.m., the trial was recessed until 1:45 o'clock, p.m., of the same day.)

5928 AFTERNOON SESSION

(The trial was resumed at 1:45 o'clock p.m., pursuant to recess.)

Justice Stephens: The hearing will come to order. Take the witness stand, Mr. Stromquist.

Thereupon, WALTER G. STROMQUIST, the witness on the stand at the time of recess, resumed the stand and testified further as follows:

Mr. Steffen: We have no further questions, Your Honor.

Justice Stephens: Cross-examination?

Mr. Bromley: May it please the Court, before I start the cross-examination, I should like to move to strike Exhibits 401 and 402, and I make the motion now because I think I may have misled the Court in what I said this morning.

As I read the argument beginning at the bottom of page 4033, with respect to Exhibit 401, this point, in effect, was argued before, because I called the Court's attention, at the bottom of page 4033, to this situation, saying:

"Suppose, instead of being what it is, this letter was a letter from Universal, a licensee, to a dealer, in which Universal said, 'Now I am going to sell you my material, but, Mr. Dealer, you observe the price I tell you.'

"Would my friend say that that, under any con-
5929 struction of the pleadings, would be material? There isn't any charge here that dealers' resale prices were

fixed, and yet a dealer's price is a resale price, is a resale transaction, in the same sense that this is. We have got to stop somewhere. We couldn't, it seems to me, possibly permit testimony that this conspiracy, as alleged in these pleadings, was broad enough to include the 20,000 dealers."

Now in this situation we have a bill of particulars which names the manufacturing distributors, which does not name Ebsary; and it seems to me that the bill of particulars still should play a function in so far as the scope of the evidence is concerned. In other words, is it not possible that this ruling means, in principle, that they could prove, if they were able to, that these defendants attempted to fix the price of paints, or roofing, or all sorts of materials, or attempted to fix the resale prices of dealers and jobbers and others, all on the theory that they were not limited by the bill of particulars because they got around it, forsooth, on the theory that they were merely proving intent, that is, showing similar crimes.

Now there must be some limitation to that doctrine, even if we accept that doctrine as being applicable here. I have had an opportunity, over the noon recess, to read the Martin case, to which Your Honor referred, and as I understand that case the only possible exception
5930 to the rule that other crimes cannot be proved, which could have any applicability here, is the theory of common scheme or plan, as to which your Honor, the Presiding Justice, in his opinion in the Martin case said:

"Some connection between the crimes must be shown to have existed in fact and in the mind of the actor, uniting them for the accomplishment of a common purpose, before such evidence can be received. This connection must clearly appear upon the evidence. Whether any connection exists is a judicial question. If the court does not fairly perceive it, the accused should be given the benefit of the doubt and the evidence rejected."

Now here we have evidence that the only sales that Universal made to a manufacturing distributor were to the Oakfield company, and we have evidence from this witness that he never sent any price list to the Oakfield company.

So what does proof of a prior crime tend to show in this situation? It certainly cannot be said that there is any connection between what he did with Ebsary and what it now appears he did not do with Oakfield. In other

words, there is no evidence here of any principal crime as to which evidence of prior crimes might color the question of intent.

Furthermore, there is no evidence that what he did with respect to Ebsary was part of any common scheme or design as to what he may have done with the Oakfield company.

5931 So that it seems to me that in effect this argument, although not expressed in words, was considered before by the Court, and that this ruling this morning in effect is reversing the position of the Court; and it seems to me that the theory of "other crimes" just doesn't fit this situation.

Justice Stephens: Well, the Court will not hesitate to reverse itself if convinced that its original ruling was incorrect. It is more important that we be right than that we be consistent, of course, in these rulings. But if we were right in the first instance, then we want to be consistent so as to rule rightly the second time.

It may be that your contentions now made are well taken.

Do you wish to be heard in response, Mr. Steffen?

Mr. Steffen: Just briefly, your Honor.

As I get the argument, when these exhibits, 401 and 402, were before your Honors previously, it seems to me that Mr. Bromley was endeavoring to show that there is no limit to the admission of papers of this sort, and he instanced the fact that we might even have to do with 20,000 dealers. I thought we met that this morning rather clearly by indicating that the Ebsary Gypsum Company was in a class by itself, it was not a dealer and it was not a jobber like Perry, for example.

The Ebsary Gypsum Company was a plaster manufacturer, in this little unique class of people who we have labelled manufacturing distributors, and the only

5932 reason it was not a distributor is because it never distributed. It became a manufacturer before it got into the distributing business.

Now, on the matter of the second point, which is with reference to the Martin case, unfortunately I have not read the Martin case because I was relying on your Honor's ruling.

It seems to me, if I understand the Martin case, that it hasn't anything to do with a conspiracy. We are here

establishing, I think, that not only Universal, but as we have shown also Ebsary and Kelley, and the other companies which have sold to manufacturing distributors, have all, more or less, adopted this same manner of influencing or controlling the resal prices and terms and conditions of resale, by manufacturing distributors. So this is not an isolated instance. This is a matter of one of the alleged co-conspirators, the Universal Gypsum Company, making an effort, as we see it, to control and influence the price of a plaster manufacturer, the resale price, and it seems to me, therefore, that the Martin case, on that reasoning, would not apply at all,—what I mean to say is that Mr. Bromley's statement that it would not apply, would not stand up for the reason that here we have a connection shown in the fact that Universal and Ebsary and the other companies who were selling to manufacturing distributors, were also sending their price information. This happens to be a little more explicit. Universal has told Ebsary
5933 that they shall sell according to such and such conditions, and shall follow such and such prices. That is right in keeping with all the other evidence that we have introduced between the other manufacturers and manufacturing distributors. And while, of course, as we pointed out this morning it is true that the Ebsary Gypsum Company never actually sold or went through with this type of bargain, that is immaterial for our charge is that they endeavored to influence or control, and the fact that they have written letters of this sort for that purpose is certainly evidence on the "other crimes" theory, to indicate that they did, or wanted to, control the price of manufacturing distributors generally.

Mr. Bromley: May it please the Court, there must be some limit to the Government's right to change its position and not be bound by the bill of particulars, and I now desire to call your Honors' attention to the fact that at page 4029 of this record Mr. Knuff has said:

"We don't contend—and this is one of the few times that you will hear me say that we admit something—we don't contend that the Ebsary Gypsum Company was a manufacturing distributor. What we say the Ebsary Gypsum Company was, is that it was a manufacturer."

Now, there must be some limit to the Government's right to change its theory and its position, not only with reference to the bill of particulars, but during the trial of the case.

Of course, it is absurd to say that the Ebsary Gyp-
5934 sum Company was a manufacturing distributor, it just never was; it was a manufacturer which took a license from us to make the board.

Mr. Steffen: We never have changed our position on that. We do not now, and never did, contend that they were a manufacturing distributor. We said that they were a plaster manufacturer in the same category as Connecticut Adamant and Oakfield and Grand Rapids and many other companies, at the time this letter was sent.

Justice Stephens: Will you please hand to the Court, Mr. Marshal, the portions of the transcript where the Court's ruling on these two exhibits appears? I do not have my copy of the record with me.

(The transcript was handed up to the Court.)

Mr. Bromley: At page 4035 I think is the final ruling.

Justice Stephens: Where were they offered?

Mr. Bromley: At page 4009.

Mr. Steffen: I believe Exhibit 402 was never offered. It was never identified until today.

Mr. Bromley: I am talking about 401, but the two things are the same.

Justice Stephens: (After examining transcript) I don't see, Mr. Bromley, where, up to page 4035, we discussed this Martin case theory.

Mr. Bromley: We didn't.

5935 Justice Stephens: Was that after that?

Mr. Bromley: We didn't discuss that in the previous ruling. All I said was that my argument, I think, was applicable to the Martin case theory.

Justice Stephens: I see.

Well, we think, upon still further consideration of the matter, gentlemen, that we ought to abide the previous ruling; even on the Martin case theory, since this Ebsary company was not charged as a manufacturing distributor, you don't get within the theory that you can introduce evidence of another wrong to prove something that is charged, because this isn't proving what is charged.

We call attention to the fact that at page 4035 the Court said that it "does not, by this ruling, restrict the Government from proving the genesis of the consipracy, and the dealings between the licensees, and the litigations and transactions and tradings alleged, but we think the objections to this particular exhibit are well taken."

So we will exclude both Exhibits 401 and 402.

Wasn't your motion directed to both exhibits, 401 and 402, Mr. Bromley?

Mr. Bromley: Yes.

(Government's Exhibits Nos. 401 and 402 were excluded.)

5936 Justice Stephens: You may cross-examine.

Cross Examination

By Mr. Bromley:

Q. Mr. Stromquist, have you Exhibit 403 before you? A. Yes.

Q. At the time you wrote Exhibit 403, that is, in January, 1930, you knew, didn't you, that Mr. Burley of the National Gypsum Company was new, so far as the plaster business in Ohio, Michigan, Wisconsin and Illinois was concerned? A. That is right.

Q. And it was your understanding, wasn't it, that he was not familiar with the going market price of plaster in those States at that time? A. That is correct.

Q. And isn't it a fact that all that he told you in the telephone conversation to which you have testified, was that he had been trying to find out what the going market price of plaster in those territories was? A. That is correct.

Q. And that he had not been able to determine what it was so far as his salesmen's reports to him were concerned? A. That is right.

Q. And he asked you if you would mind telling him what your company charged for plaster in the terri-

5937 tories mentioned, isn't that right? A. That is right.

Q. And as a result of that conversation, you wrote him the letter of January 8, 1930, Exhibit 403, and enclosed your price list to the trade for that territory, didn't you? A. That is right.

Q. Now did you, at that time, or at any time, have any understanding or arrangement or agreement of any kind, with Burley or anyone from the National Gypsum Company, as to what price or prices the National Company would or would not charge for plaster anywhere in the world? A. Positively not.

Q. When you wrote, in Exhibit 403, "However, I suggest you check this with Charley the next time you are in Chicago to make sure", you merely meant, didn't you, to suggest to

Burley that he ask Henning what USG's prices for plaster were in those territories? A. That is correct.

Q. As a matter of fact, the United States Gypsum Company had had a much wider market experience in plaster sales in those territories than you had had for your company, at that time? A. That is correct.

Q. And you thought probably that Henning knew more about the going market price in those territories
5938 than you did, didn't you? A. I knew that he knew more than I did.

Q. Now was it your purpose to suggest to Burley that he approach Henning for the purpose of entering into any arrangement or agreement or understanding with Henning as to what prices should be charged by anybody for plaster in the Middle West territory? A. Will you kindly restate that question again?

Mr. Bromley: Will you read it, please?

(The question was read by the reporter.)

The Witness: No.

By Mr. Bromley:

Q. Did you have any arrangement or understanding or agreement with Henning, or with anybody else in the USG Company, as to what prices should be charged by you or by USG for plaster anywhere? A. Absolutely not.

Q. Now there always has been the strongest and the most vigorous kind of competition in plaster, including price competition, hasn't there, all the time that you were in the gypsum industry? A. That is correct.

Q. By the way, you said at one point in your direct-examination that there was strong competition in board in 1927 and 1928, I believe. Do you remember that? A. Yes, sir.

5939 Q. Well, isn't it the fact that at all times during your connection with the gypsum industry, there was strong competition among the manufacturers in the sale of gypsum board? A. Yes, I think that is a correct statement.

Q. And your experience in the gypsum industry goes down at least into 1931, doesn't it? A. It goes back to 1919.

Q. And ended at least as late as 1931, didn't it? A. That is right.

Q. You knew at the time you wrote Exhibit 403 that you could not lawfully agree with any of your competitors as

to prices they should charge for plaster, didn't you? A. Yes.

Q. And you never had any price agreements as to plaster with anybody at any time, did you? A. Absolutely not.

Mr. Bromley: Will you show the witness Exhibit 609, please?

(Government's Exhibit No. 609 was handed to the witness.)

Justice Stephens: Exhibit 609 is in evidence, is it not?

Mr. Bromley: Yes, Your Honor, for the limited purpose suggested by paragraph 2, of showing that this wit-
5940 ness had an expectation of a price rise in board at the time he wrote this letter.

Justice Stephens: That is right.

By Mr. Bromley:

Q. You had no special reason, did you, Mr. Stromquist, for suggesting to Emil Hansen that he make no future price commitments beyond the period for immediate delivery? A. None other than the fact that the Universal Gypsum & Lime Company, operating under receivership at the time, was very low in funds, working capital, did not want to make many sales of board products at prices prevailing at that time, which showed no profit to them.

Q. And isn't it the fact that when you wrote that second paragraph, you were afraid that if Hansen committed himself at a price for a long period in the future, that you would be forced to sell him at a price then prevailing, in spite of the fact that prices might have risen? A. That is correct.

Q. And you didn't want to get in that situation? A. That is absolutely right.

Q. You did the same thing with all of the people to whom you were selling board at that time, didn't you? A. That is right.

Q. That is, you didn't want to be committed to them simply because they had taken orders for advance
5941 delivery at a time when prices were low, and you hoped they might go up; isn't that right? A. That is correct.

Q. Did you have any knowledge or information of any kind that USG would increase prices to its licensees at or about this time, in June? A. No, sir.

Q. As a matter of fact, you weren't even aware of the fact that four additional companies had signed license agree-

ments in May, 1929, as of the date you wrote this letter, were you? A. No.

Q. And you had no thought, had you, in your mind, of any kind, that USG might do something at about this time to increase the price which you could charge for board? A. No.

Q. You never at any time had any agreement, arrangement or understanding with the Oakfield Company as to what resale prices they would charge, did you? A. No, sir.

Mr. Bromley: That is all.

Justice Stephens: Any further cross-examination by other defendants' counsel?

(No response.)

Justice Stephens: Any re-direct-examination?

5942 Mr. Steffen: I hope Your Honors will hear me for just a moment on Exhibits 401 and 402.

As I got Your Honors' ruling, you were staying with the ruling which had previously been made as respects a declaration or as respects its bearing upon resale price control?

Justice Stephens: That is right.

Mr. Steffen: And I offered them this morning on one other ground, and I want to make sure whether Your Honors considered that in making your recent ruling. The other ground was that we had one of the co-conspirators, the Universal Gypsum Company, writing a letter in which they make what I would contend is an admission, and I would offer it on the basis of an admission, that they were of a mind to control and fix prices and means and methods of sale. Whether that constitutes a declaration, whether it is designed for purposes of influencing the actual resale price of any manufacturing distributor or not, it seems to me proper to say that it constitutes an admission on the part of the Universal Gypsum Company, and as such that it would be admissible, the admission being that they are prepared to control resale prices and prepared, moreover, to set up a system of pricing concerning sales terms and conditions, which would be dictated under the license agreement.

So that I should think they would be admissible
5943 as an admission, whether or not upon the ground that was previously argued.

Justice Stephens: Do you wish to be heard as to that, Mr. Bromley?

Mr. Bromley: It doesn't seem to me that it does any good to argue it on the basis of an admission, unless the admission is as to something that is charged in the complaint. Suppose this witness testified that he was of a mind to control the resale prices of the 20,000 dealers in this country—what probative force has that admission with respect to any issue in the case, since there is no charge that anybody ever tried to control the resale prices of dealers? Suppose he was of a mind to control the prices of roofing that his company manufactured? Since there is no charge that anybody ever attempted to, or ever did any such thing, of what probative value is his state of mind? It seems to me none.

Mr. Steffen: I can point out simply that Mr. Bromley, if he resorts to roofing manufacturers, might as well have resorted to ice cream cones. They are utterly irrelevant. This hasn't anything to do with ice cream cones; it has to do with their state of mind with respect to plaster manufacturers' resale prices, and that is charged in the complaint.

Mr. Bromley: There is no charge as to Ebsary in the complaint, anywhere.

5944 Mr. Steffen: We have gone through that argument. There is a charge in paragraph 45(e), I think, that there is a conspiracy here to influence and control the resale prices of manufacturing distributors. We have indicated in argument that while the Ebsary Gypsum Company was not named a manufacturing distributor, which is perfectly clear, that they were at least the same type of manufacturer that all the other manufacturing distributors were. They are not roofing manufacturers or something else, or 20,000 dealers. They are the same type of people. And this shows, as I see it, a state of mind to control the resale prices by that type of person, that is, a plaster manufacturer. It is right down the line.

Mr. Bromley: That is just suggesting a way, it seems to me—

Justice Stephens: (Interposing) You need not reply, Mr. Bromley.

We are sorry, Mr. Steffen, but we are now convinced that Exhibits 401 and 402 are not admissible in evidence under the charges in the pleadings. We don't think that your last argument raises any new question. If they are not admissible for the reasons we have just stated, they are not admissible as admissions to prove the same thing for which they were offered.

I am sorry, but we can't seem to agree with you about that.

5945 Redirect Examination

By Mr. Steffen:

Q. Mr. Stromquist, you testified concerning the nature of the competition in the industry during the years 1927 and 1928. Do you recall that? A. Yes, sir.

Q. And what was your description of it? A. Strong competition.

Q. And did you say that prices were demoralized? A. Yes.

Q. During that period? A. Yes.

Q. Would you say that the competition that existed after May, 1929, when the various license agreements were signed, was of the same character? A. I would say so, because prices were still not profitable.

Q. What do you mean by that, Mr. Stromquist? A. It was impossible for the Universal Gypsum & Lime Company, speaking as one organization, to make a profit on the prices that prevailed.

Q. You mean that the prices were too low? A. They were too low, that is correct.

Q. And when you said "demoralized", did you mean that they were too low, or that they varied? A. They

5946 were also too low.

Q. Which did you mean, both? A. Well, you had a range of prices, the prices were not identical in all territories, but the entire range had a low level.

Q. And you testified, I think, that you might be offering your board at $23 or $24, and a dealer would tell you that he got it for $22? A. Yes.

Q. And that prices, in that sense, were demoralized; is that what you meant to say? A. Yes.

Q. It has been testified here that after May, 1929, the licensees sold board at uniform prices fixed by USG. Is that your information? A. USG did establish minimum prices.

Q. So that the competition after May, 1929, was not on a price level, is that what you mean to say? A. I beg your pardon?

Q. The competition after May, 1929, was not as respects prices? A. The general situation was not without competition. There were still prices lower than those set by USG in the field, although probably not as bad as prior to

May, 1929, but there were still some low prices being quoted.

5947 Q. You mean they were selling contrary to the USG bulletins? A. That is right.

Q. How long did you stay in the business? A. Until February of 1931.

Mr. Steffen: That is all.

Mr. Bromley: No further questions.

Justice Stephens: You are excused, Mr. Stromquist. Thank you for attending the Court.

(Witness excused.)

Mr. Steffen: Mr. Ingberg, will you resume the stand?

Thereupon, S. H. INGBERG recalled as a witness for and on behalf of the United States, having been previously sworn, resumed the stand and testified further as follows:

Justice Stephens: The Court will say, Mr. Steffen, in respect of the testimony of Mr. Ingberg, that it was not the understanding of the Court, when this witness was being examined this morning, that you were asking him to testify of his own knowledge with respect to these fire tests. He was testifying, obviously, from data that he had on the desk before him as to what was written therein, and we understood you were seeking to prove what was recorded; and therefore, the best evidence rule being invoked,

5948 we were obliged to apply it. We didn't intend the ruling to forbid the Government from asking this witness, if the Government thinks it is relevant and necessary to its case to do so, whether or not he personally conducted these tests, and what he personally learned or saw in them. We didn't understand, however, that you were going into that.

Mr. Steffen: That is exactly what I wanted to go into, Your Honor, and I am sorry if I didn't make myself clear, because Mr. Ingberg—I would like to ask him some questions along that line.

Justice Stephens: We understood you were trying to prove the contents of exhibits.

Mr. Steffen: No.

Justice Stephens: And that being true, the best evidence rule was necessarily invoked and properly ruled upon. But if you want to ask this witness if he conducted these tests personally, and what he saw happen in them, you may do that.

Direct Examination (resumed)

By Mr. Steffen:

Q. Did you conduct this test on March 17, 1938, on Schumacher board? A. Yes.

Q. Did you do that personally? A. I was present at the test.

Q. What is your position out there, are you in
5949 charge of the division? A. I am in charge of the section.

Q. And how many people do you have with you? A. From ten to fifteen.

Q. Who is your assistant? A. N. D. Mitchell.

Q. And did he participate in the tests of the Schumacher board? A. He did.

Justice Jackson: Were the tests made under your supervision?

The Witness: That is right.

By Mr. Steffen:

Q. And you drew up the report, did you? A. I think Mr. Mitchell drew up the report.

Q. Did you examine it? A. Yes.

Q. And did you approve it? A. Yes.

Q. Well, now, I would like to have you describe the board submitted by Schumacher as respects the size of the holes and the arrangement of the holes, if you can do so?

Mr. Bromley: I object to it as immaterial.

Justice Stephens: We have overruled that objection previously, and that will be overruled again.

5950 Let the Court explain to you, Mr. Ingberg—I am not sure whether you are familiar with our practice in the courts or not—if you have an independent recollection of something, which you personally saw or observed or participated in, of course you can tell about that. And if you have any data which refreshes your recollection, you may consult that and then testify as to your own recollection. But if what you are testifying to is merely, without reference to your recollection, what is recorded in exhibits, then we have to have the original exhibits. If you will keep those discriminations in mind, we will appreciate it.

The Witness: Well, Your Honor, we conduct so many hundreds of tests that, of course, the details of each individual test can not remain clear in our minds. We have to refresh our recollection.

Justice Stephens: Well, if these items you have in front of you refresh your recollection so that you can, after looking at them, tell us from your own recollection what happened, then you may freely do that. But if you frankly don't remember anything about it except, in a general way, that a test was held, and are therefore really reading to us the contents of exhibits, then we ought to have those exhibits to read them ourselves, with your help.

The Witness: Well, Your Honor, I might say that the original incident wouldn't be in my recollection ex-
5951 cept as the main results of the test have been refreshed from time to time by reading of various reports, and so on.

By Mr. Steffen:

Q. Tell us, if you can, now, consulting your reports and according to your best recollection, what type of board Schumacher submitted to you for the test on March 17, 1938, as respects size of holes and arrangement? A. I had their records gone over only during the past week or two, and a sketch prepared showing the arrangement of the holes. That is the best I can do—

Mr. Bromley: (Interposing) Who prepared the sketch?

The Witness: The sketch was prepared by my assistant, Mr. Mitchell.

Mr. Bromley: And you don't remember anything about the board that was tested, at all, do you?

The Witness: So far as the details of the holes are concerned, I would have to depend on the records in our record books that he consulted in preparing this sketch, and also we have a photograph showing the board.

By Mr. Steffen:

Q. Can you tell us now, Mr. Ingberg, the size of the holes and the arrangement of the holes in the Schumacher board?

Mr. Bromley: I object to that as incompetent unless the original report in which these details were, I
5952 assume, carefully recorded at the time, is produced.

Justice Stephens: Mr. Steffen, in a desire to be entirely fair in our ruling towards the Government and to give the Government every proper opportunity to prove by this witness what the witness knew, we opened the door to you to call on this witness to testify as to his own knowledge; but it now appears that he doesn't recollect, himself, and couldn't be expected to, because he is the man in charge of

dozens of these tests. So it seems to me we are back where we started, that you really haven't got a witness that can testify from his own recollection but a witness who can identify records. So you had better proceed along that line.

Mr. Steffen: He hasn't said yes or no to my question, Your Honor. I have asked him now several times whether he can tell us, after consulting his records, what the size of the holes was in the board submitted by Schumacher, and their arrangement.

Can you tell us that now, Mr. Ingberg?

Mr. Bromley: I object to that, because it is apparent that he can only do it by reading it off the paper.

Justice Stephens: That is obvious, Mr. Steffen. He is reading it to us. The witness is frank and honest, and states that he can't remember the details at all. That being true, he is just giving us the contents of the
5953 records. Why not put the records in?

Do your records show the size of these holes, Mr. Ingberg?

The Witness: Yes, sir.

Justice Stephens: Why not have the records, Mr. Steffen?

Mr. Steffen: The witness hasn't really answered the question.

Justice Stephens: Very true, but the question is objected to upon the ground that it is obvious he is not answering from his own knowledge, but from the contents of records, and therefore the records ought to go in. We sustain that objection.

By Mr. Steffen:

Q. What records would you refer to, Mr. Ingberg, to ascertain the size of the holes and their arrangement—I mean the original records? A. We have the construction records—I am not sure whether they are here now—and of course, we have the report—

Justice Jackson: (Interposing) A copy of the report that you sent to Schumacher?

The Witness: Yes.

Justice Jackson: Does that give all the details?

The Witness: Yes.

5954 Justice Stephens: Why not have that?

Justice Jackson: That is the report that was made.

Justice Stephens: There is no objection to that being

raised. Mr. Bromley stated before the recess that he would raise no objection as to its being a copy as distinguished from the original.

Mr. Steffen: I will say to Your Honor that we have no objection, so far as the Government is concerned, to introducing these reports. This is a highly competitive industry, not on a price level, but in other regards, and I don't think that the defendants are altogether entitled to look at what is a confidential communication between the Bureau of Standards and the Schumacher people, or the National Gypsum Company, as to the way their boards tested, and so on, and so on, and so on.

Mr. Ingberg conducted the tests. While it is true that he can't remember all the little details, it is very usual for a witness to look at records and from those records to testify. It is past recollection recorded, and on the basis of past recollection recorded he is entitled to testify directly.

Justice Stephens: I am sorry, but we have been through all this. When past recollection recorded is relied upon, then the record comes into evidence. When present recollection refreshed is being used as the expedient to
5955 prepare testimony for admission, then the records may be consulted, but if they refresh recollection the witness testifies.

Obviously this witness doesn't—and he frankly states he can't be expected to—remember all these details himself, and these items don't refresh his recollection.

Mr. Finck: I would like to state that I would be glad to waive any objection that I might have as to the secrecy of any of the tests.

Justice Jackson: Does it make any difference what size the holes are, in your testing, your fire tests?

The Witness: Within certain limits—

Justice Jackson: (Interposing) What do you mean, "within certain limits", within a certain time? For instance, if you were testing board or lath, perforated in any manner, or indented, that would pass an hour's fire test, would it make any difference whether they were big holes or little holes?

The Witness: I think it would.

Justice Jackson: It would?

The Witness: Yes. If they are too small, they don't seem to afford strength to hold the plaster in place.

Justice Jackson: How about a 3/16 inch hole?

The Witness: The plaster wouldn't enter the small holes as readily as the large ones.

Justice Jackson: But if it did enter it, it would
5956 pass the fire test?

The Witness: Under practical conditions of application, it probably wouldn't enter a small hole.

Justice Stephens: I don't see what more we can do, Mr. Steffen. We have tried to be very fair with the Government in respect of this witness. We had thought this noon we had perhaps misunderstood you. But now, if you are relying upon these records, which you obviously are, you can't have your cake and eat it. If you want to rely on them, they will have to come in. I don't see how we can exclude them on the theory that they contain trade secrets, unless somebody raises that objection.

The Witness: On the matter of secrecy of our reports, Your Honor, anyone is entitled to witness any of our tests, and naturally that means that whoever witnesses the tests will know something about the construction. Whereas, we may not send out these reports to anyone that asks for them, we do not put them in anything approaching either a restricted or secret status.

Justice Stephens: You do not do what?

The Witness: We do not put our reports in any restricted or secret status.

Justice Stephens: Although you don't send them out indiscriminately, you do permit people with a proper interest to have access to them?

5957 The Witness: Yes.

Justice Stephens: That would seem to end the trouble. Thank you for your statement.

By Mr. Steffen:

Q. I now show you what has been marked Government's Exhibit 610, which purports to be a report of the National Bureau of Standards under date of March 31, 1938, having to do with the Schumacher Wall Board Corporation board.

(The document referred to was marked as Government's Exhibit No. 610 for identification.)

Mr. Steffen: I regret I don't have any copies, but I think the reason is well understood.

Justice Stephens: Well, we will have to look at it, or those portions of it which are relevant.

(Government's Exhibit No. 610 for Identification handed to the witness.)

By Mr. Steffen:

Q. Will you examine Exhibit 610, Mr. Ingberg, and tell me whether that is a copy of the report, the original of which was sent to the Schumacher Wall Board Corporation? A. It is.

Mr. Steffen: We offer in evidence Government's Exhibit No. 610, which is the report upon the fire test of the Schumacher perforated wallboard.

5958 Justice Stephens: Submit it to counsel, please, after the witness has examined it further, if he wishes.

(Government's Exhibit No. 610 for Identification handed to defendants' counsel for examination.)

Mr. Steffen: I will now ask to have this marked as Government's Exhibit 611 for Identification. My thought in doing that at this time is that it is the same type of report, having to do with National, and I felt that the Court could be looking at this copy while Exhibit 610 is being examined by defendants' counsel. This purports to be a report on the National Gypsum Company lath, under date of December 31, 1936, signed by Mr. Briggs as Director of the Bureau of Standards.

(The document referred to was marked as Government's Exhibit No. 611 for Identification.)

(Government's Exhibit No. 611 for Identification was handed to the witness.)

By Mr. Steffen:

Q. Will you please examine Government's Exhibit No. 611, Mr. Ingberg, and state whether or not that is a copy of the report which was sent to the National Gypsum Company? A. Yes, it is.

Justice Stephens: Hand it to defendants' counsel.

(Government's Exhibit No. 611 for Identification
5959 was handed to defendants' counsel for examination.)

The Witness: Your Honor, would you permit me to explain a little further on the availability of reports of the National Bureau of Standards, in order that the record might be clear?

Justice Stephens: Yes, in just a moment. Let counsel give their attention first to examining these exhibits, because they will want to hear you, also.

(Government's Exhibits Nos. 610 and 611 for Identification were handed to the Court for examination.)

Justice Stephens: Announce the afternoon recess.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

5960 Justice Stephens: Proceed, Mr. Steffen.

Mr. Bromley: We object to both exhibits on the ground that they are immaterial and irrelevant.

Justice Stephens: That objection is overruled, and Exhibits 610 and 611 are admitted in evidence.

(Government's Exhibits Nos. 610 and 611 were received in evidence.)

By Mr. Steffen:

Q. Can you tell us—

Justice Stephens: (Interposing) Pardon me, Mr. Steffen.

You wanted to make some further statement, did you not, Mr. Witness?

The Witness: The remarks I made should apply to the types of tests concerned. We undertook these tests with the understanding that we would be permitted to include the results in publications, that is, it was a part of a general research testing program on the fire resistance of partitions, and on tests of that kind the reports are not privileged, and we intended to include them in the publication which is a part of the exhibit here, and that is available to anyone.

Justice Stephens: Thank you. Proceed, Mr. Steffen.

By Mr. Steffen:

Q. By way of translation, Mr. Ingberg, can you say whether or not the Schumacher lath submitted for test on March 17, 1938, as reported in Exhibit 610, passed

5961 your so-called 1-hour fire test? A. It did.

Q. Can you say the same thing with regard to the lath submitted by National, which is reported in Exhibit 611, under date of December 31, 1936? A. It passed it within the tolerance limits that we apply in tests of that kind.

Justice Stephens: Judge Garrett is moved to inquire whether or not this is the only copy that the Bureau of Standards has, or have you other copies of these exhibits?

The Witness: We can permit these copies to remain in the records of the court.

Justice Stephens: Very well, thank you.

Mr. Steffen: That is all we have.

Justice Stephens: Cross-examination.

Cross-Examination

By Mr. Bromley:

Q. Mr. Ingberg, as I understood you, you just told Mr. Steffen that the lath submitted by the Schumacher Company for test, and reported on in Exhibit 610, passed the 1-hour fire test—is that what you said? A. That is right.

Q. Now, as a matter of fact, Exhibit 610 covers two separate tests of two entirely different laths manu-
5962 factured by Schumacher, doesn't it? A. It does.

Q. And in Exhibit 610 the first board tested bears Test No. 120, does it not? A. That is right.

Q. And the second lath bears Test No. 123, doesn't it? A. That is right.

Q. And the fact is that the Schumacher lath tested under Test No. 120 failed to pass the 1-hour test, isn't that right? A. That is right.

Q. And it was only the lath tested several months later, under Test No. 123, which did pass the test, isn't that right? A. That is right.

Q. The 1-hour fire test. A. That is right. Could I qualify that?

Q. Yes. A. I understood Mr. Steffen to give the date of the test.

Mr. Steffen: Yes, March 17, 1938. That was Test No. 123.

The Witness: Yes.

By Mr. Bromley:

Q. So your answer was meant to only indicate just the particular lath submitted by the Schumacher Com-
5963 pany and tested under Test No. 123, which test occurred on March 17, 1938, that only that lath passed the test? A. That is right.

Q. And the other lath tested under Test No. 120 did not pass the test; did it? A. That is right.

Q. The 1-hour test? A. That is right.

Q. Now, there was a difference between the two pieces of lath, that is, a difference between the Schumacher lath

tested under Test No. 120 and the lath tested under Test No. 123, was there not? A. There was.

Q. What was the diameter of the holes in both the tests? A. 13/16ths inch.

Q. 13/16ths of an inch is 1/16th inch more than 3/4ths of an inch, isn't it? A. Yes.

Q. So that 13/16ths of an inch is pretty close to 3/4ths of an inch in diameter, isn't it? A. It is.

Q. Now, the lath of the Schumacher Company that was tested under Test No. 120 had 42 holes for each
5964 piece of lath, did it not? A. That is right.

Q. And the lath tested under Test No. 123 had 48 holes for each lath, did it not? A. That is right.

Q. And each lath tested under Test No. 120 and Test No. 123 had the dimension of 16" x 48", did it not? A. That is right.

Q. So that while the diameter of the holes was the same in both laths tested under both tests, the spacing of the holes was different, is that right? A. That is right.

Q. Would it be correct, Mr. Ingberg, to say that in Test No. 120 the holes were farther apart than in Test No. 123? A. On the average they would be.

Q. And the fact is that the board with the 42 holes failed to pass the test, while the board with the 48 holes passed the test, isn't that right? A. That is right.

Q. Now, doesn't that mean, Mr. Ingberg, that wherever a municipal building code calls for fire resistant 1-hour fire test board, the only board of Schumacher which could be sold for that use is the 48-hole board?

Mr. Steffen: I wonder if that question isn't going too far in that it seems to ask for the construction
5965 of the building ordinances or building codes.

Mr. Bromley: I will withdraw the question for a moment.

By Mr. Bromley:

Q. You are an expert on building codes and ordinances, aren't you, Mr. Ingberg? A. I have worked with them for some time.

Q. And among the many reports which have come out of the Bureau of Standards under your guidance, is a report issued in 1942 which considered very carefully the provisions of the buildings codes of most of the larger cities of this nation, isn't that right? A. Do you refer to our BMS92?

Q. Yes A. Yes.

Q. That is right, isn't it? A. Yes.

Q. So you would say that you have a pretty comprehensive knowledge of building codes throughout the United States? A. I have had contacts with them from the standpoint of fire resistance requirements.

Q. And isn't it true, generally speaking, that these building codes throughout the United States have very definite requirements with respect to whether materials can be used, based on whether they pass your 1-hour fire
5966 test or whether they don't? A. For use in certain locations in buildings, the building codes will require certain fire resistance.

Q. And isn't it fair to say that this Schumacher board tested under Test No. 120, with the 42 holes in it, could not be used anywhere in the United States in places where board having a 1-hour fire rating was required? A. On the basis of these tests, it would not qualify for the 1-hour rating, that is, the plaster construction and board together.

Q. Now, in the National tests, covered by Exhibit 611, you likewise tested two laths, didn't you? A. Yes.

Q. And there again one lath passed the test and one did not, isn't that right? A. That is right.

Q. In Exhibit 611 what were the test numbers? A. 78 and 89.

Q. 78 and 89? A. Yes.

Q. The lath tested under Test No. 78 did not pass the 1-hour fire test, did it? A. The construction, of which the lath was a part, did not pass.

Q. On the other hand, the lath tested under Test
5967 No. 89 did pass the 1-hour fire test, didn't it? A. The construction of which it was a part did pass the 1-hour fire test.

Q. What were the differenees between those two boards? A. The lath tested under Test No. 78 had 54 holes, 5/8ths inch in diameter; that lath in Test No. 89 had 54 holes, 7/8ths inch in diameter, both with the same arrangement.

Q. What was that arrangement in both cases, staggered? A. It was a staggered arrangement, three in a row in the short direction of the board, staggered.

Q. These two laths were of the same size, that is 16" x 48", as the Schumacher laths, weren't they? A. That is right.

Q. Now, you have tested a great many kinds of gypsum lath, haven't you? A. Well—

Q. (Interposing) Over the years? A. Yes.

Q. And you have found out, haven't you, Mr. Ingberg, that there is a very definite relation between the size of the holes and their spacing, so far as ability to pass a 1-hour fire test is concerned? A. Within certain limits there appears to be such a relation. May I extend my explanation?

Q. Do, yes. A. We, however, call attention in our
5968 publication to the fact that the strength and quality of the plaster is a very important consideration in the fire resistance obtained in this type of construction.

Q. And did you ever find any kind of a perforated lath, which had a hole less than 3/4ths of an inch in diameter, which successfully passed the 1-hour fire test? A. In our tests, we did not.

Q. And isn't it a fact that you never found a perforated lath which would pass the 1-hour fire test which didn't have holes arranged so that there was about one hole to every 16 square inches of surface of lath? A. It would be approximately of that order.

Q. And in this report, BMS92, to which you referred, don't you make this statement—Have you got it there, by the way? A. No.

Q. Have you got it in court with you? A. I don't think so. I might recognize the quotation.

Q. Don't you say on page 34 as follows:—

Mr. Steffen: (Interposing) I wonder if the witness cannot be shown a copy of that, if Mr. Bromley is going to question him about it.

Justice Jackson: He said he thought he would recognize the quotation.

By Mr. Bromley:

5969 Q. Don't you say at page 34 of BMS92:

"gypsum plaster on 3/8-in. perforated gypsum lath, one 3/4-in. diameter hole or larger per not more than 16 in.^{2} of lath surface"—a 1-hour fire rating, according to your test? A. That is not for 1-3/4-inch diameter holes, but for 3/4-inch diameter holes.

Q. I was reading just as it appears in this book.

I will read it again.

"gypsum plaster on 3/8-in. perforated gypsum lath, one 3/4-in. diameter hole or larger per not more than 16 in.^{2} of lath surface"—1-hour fire rating. A. That is correct, according to the result of our test.

Q. And don't you also say:

"gypsum plaster on 3/8 in. gypsum lath, plain, indented, or perforated other than as above"—45 minutes fire rating. A. That is correct according to our test.

Q. Now, those two sentences sum up the results of all of your tests over the years, don't they, on perforated lath? A. They do, except I would have to have incorporated in that the same qualifications I recently gave, that the perforations in the lath are not the only factor in determining the fire resistance of the construction.

Justice Stephens: Didn't you conduct these tests
5970 with plaster of a constant quality, so far as each test was concerned, so you would have a control on that?

The Witness: We did not have consistent quality of plaster; it varied quite widely, and we saw the results in the tests. In fact, we have results where, in construction in which we applied lath conforming with these requirements, it did not pass the 1-hour fire rating, apparently on account of the quality of the plaster.

By Mr. Bromley:

Q. Now, you make no such qualification as you have just given, in BMS92, do you? A. I think we do, sir. If you look on page—Not in BMS92, no, but in BMS91 which is an exhibit here.

Q. I am talking about BMS92. You don't say anything about what you have just told the Court in BMS92? A. I cannot recollect whether something to that effect is in BMS92 or not. We had—

Q. (Interposing) Wait a minute. BMS92 was issued October 7, 1942, wasn't it? A. Yes.

Q. And that is the latest publication of the Bureau of Standards on the subject of fire-resistant perforated lath, isn't it? A. But it is a very brief summary.

Q. Whether it is brief or long, it is your latest
5971 publication, isn't it? A. It is.

Q. Now, whenever you have reported on these tests, such as in Exhibits 610 and 611, you have carefully given all of the characteristics of the plaster, haven't you? A. We have defined the plaster used.

Q. That is to say, you haven't gone in here with a blind test, not knowing whether you had what you call a good

plaster or a bad plaster; have you? A. We made tests on the plaster that would determine, at least in considerable part, the properties of the plaster.

Q. For instance, in Exhibits 610 and 611, you publish, as a part of the report, just what kind of plaster it was and just what characteristics it had as to tensile strength and compressive strength, and how much sand there was in it, and how much water there was in it, and all about it, don't you? A. That is right.

Q. And that has been your practice with each one of the tests you have made? A. That is right.

Q. So that there isn't any mystery, so far as your report is concerned, as to the kind of plaster used, is there? A. No.

Q. Wouldn't you say no to that, Mr. Ingberg?
5972 A. No, there isn't.

Q. Now, quite apart from the grade of plaster which was used, isn't it the fact, sir, that there never has been any perforated lath which passed the 1-hour fire test, which did not have at least a 3/4-inch hole, and one hole to each 16 square inches of surface? A. As far as our tests are concerned, that is correct.

Q. And you found, didn't you, that where you got smaller holes, such as Justice Jackson referred to a few minutes ago, or differently spaced holes, the board just would not pass the 1-hour fire test, isn't that so? A. There was an indication that the conditions for meeting the requirements were better with the larger holes.

Q. Now, you tested, yourself, the perforated lath which USG has sold since 1933 or thereabouts, didn't you? A. Yes.

Q. And you made that test in 1932, didn't you? A. Yes.

Q. You remember that board which you there tested had 3/4-inch holes, one hole to each 16 inches of surface, spaced in parallel columns?

Mr. Steffen: I object to any examination concerning the USG test. I don't think, in any strict or loose sense, that we have opened the subject of the USG test. If the defendants wish at the proper time to put in evidence
5973 concerning whether USG lath passes or does not pass, that will be appropriate.

Justice Stephens: Is there anything in the exhibits which have been offered or introduced which relate to the U. S. Gypsum Company test?

Mr. Steffen: The two exhibits are specific on Schumacher and National.

Mr. Bromley: One of counsel's first questions was whether or not the witness had not made tests of USG, National and Schumacher lath, and the witness said that he had.

Now, my friend puts in tests of the Schumacher and National lath and leaves out the USG test. Certainly the foundation is there for cross-examination as to the USG test. He brought it out.

Mr. Steffen: I asked the question, your Honor, but we did not go into the USG test at all. It was merely a preliminary question.

Justice Stephens: I am afraid you have opened the door, if you asked that question, and you concede that you did. Otherwise the record would have the inference that the USG lath was not good and that this other lath was. Counsel is entitled to explain that, if he can. The objection is overruled.

Mr. Bromley: Will you read the question, please?

(The question was read by the reporter.)

The Witness: Yes.

Mr. Steffen: I object to that. We must have
5974 the best evidence in this case. It seems to me, the witness being unable to answer on direct examination practically the same type of questions with respect to National and Schumacher, and your Honor overruling any effort on our part to get such recollection, that we should insist, when the same matter is coming up with respect to another company, that the best evidence rule should be applied.

Justice Stephens: Well, the Court ruled that if this witness could answer from his own recollection he was permitted to answer. But he stated that he couldn't. Now, we will apply exactly the same rule on both sides of this examination.

Mr. Steffen: Your Honor, may I say that I don't think he stated that he couldn't. There was an objection made every time, for about 15 or 20 times, and he didn't have an opportunity to answer.

Justice Stephens: I am sorry, Mr. Steffen, but I think the witness told the Court clearly, with voluntary statements, on his part, that he conducted a great many of these tests, some of them with the assistance of assistants, and that he did not purport to remember all the details of them or remember them himself, and the Court observed that

he was reading from documents. However, the Court of its own motion opened the door, Mr. Steffen, to you, and asked if you wanted to examine this witness as to his own recollection, and you said yes, that that is what you had called him for.

5975 Then, when you proceeded to do that, it was made clear, I thought, that he didn't have a recollection of his own.

Now, if he still has one, if either side can bring that out we are perfectly willing to listen to this witness as an expert, as to what he knows himself as to these tests.

Mr. Steffen: May I ask that the data which he has before him be removed?

(The papers immediately in front of the witness were removed.)

Justice Stephens: That was on the witness stand when you examined him, Mr. Steffen.

Mr. Steffen: I didn't attempt to examine him on his recollection, because when he looked at it, as he has for Mr. Bromley, we were simply told that he was reading from the document.

Justice Stephens: Mr. Steffen, it seems to the Court that it has been extraordinarily patient and fair and liberal, but if you still think, seriously and sincerely, that this Court has denied you an opportunity to probe this witness' own recollection, we will re-open the direct examination.

Mr. Steffen: I think that would serve no purpose now, your Honor, and I make no point of it.

Justice Stephens: Very well.

Mr. Steffen: We have introduced the two exhibits, and that settles the matter, but I think so far as further

5976 examination is concerned—

Justice Stephens: (Interposing) We will apply exactly the same rule, of course, on both sides.

Mr. Steffen: Thank you.

Justice Stephens: If this witness has an independent recollection, he may give it; if he hasn't, then you will have to examine on the records, Mr. Bromley.

By Mr. Bromley:

Q. Well, you answered my question "Yes", didn't you, Mr. Ingberg? A. That is correct, as to the—

Q. (Interposing) 3/4-inch holes, one for every 16 inches of surface, and in parallel rows. A. Yes.

Q. And that means that there were 48 holes in each lath 16" x 48", doesn't it? A. Yes.

Q. That board which you tested in 1932 passed the 1-hour fire test, and you gave it a 1-hour fire rating, did you not? A. That is right.

I might explain to the Court, if I may, the reason my recollection is better on this, because it is a regular arrangement of holes; it isn't a staggered arrangement such as we were up against on the other lath.

5977 Q. And as a matter of fact the board which you tested for USG was the first perforated lath which you had ever tested, was it not, which passed the test? A. Yes, the first we had subjected to fire tests.

Q. And it was the first one ever to pass the 1-hour fire test, wasn't it? A. That is right.

Mr. Bromley: That is all.

Justice Stephens: Do other defendants wish to cross-examine?

(No response.)

Justice Stephens: Is there any redirect examination?

Mr. Steffen: We have no further questions, your Honor.

Justice Stephens: Mr. Ingberg, please let me be sure that I understood you correctly. Did I or did I not understand you correctly, in answer to my questions and in your voluntary statements, to say that with respect to the National and Schumacher tests, you were under the necessity of referring to the exhibits themselves, rather than testifying from your own recollection?

The Witness: That is right.

Justice Stephens: In other words, they did not refresh your recollection, you had to look at them and see what was in them?

The Witness: I had to, sir, on account of the irregular arrangement and staggered pattern.

5978 Justice Stephens: Very well. Thank you very much.

(The witness was excused.)

Justice Stephens: Have you any other witness today?

Mr. Steffen: No, your Honor, we have no other witness. However, we have some requests for admissions that we could take up at this time.

Justice Stephens: Very well.

Mr. Steffen: I might, however, raise one question.

In connection with Exhibit 233, in the Dowd matter, as you remember, we got in contact with Mr. Alexander S. Speer, and I have asked him, because of the shortness of time, to come. I would like to have authority to subpoena him. He is the man about which the report has to do, and I think he will be able to connect things up.

Justice Stephens: You may have authority to subpoena Mr. Speer.

Mr. Steffen: Thank you. He will appear Friday.

Justice Stephens: Very well.

Mr. Knuff: May it please the Court, in connection with Mr. Emil Hansen's testimony, Exhibits 561, 562 and 563 were offered, I believe, and received, and at that time we did not have photostatic copies of the exhibits for the Court, and the Court asked me to have them prepared. I have those exhibits now and will hand them up to the Court.

Exhibit 561 bears the date of February 4, 1929;
5979 Exhibit 562 bears the date of July 31, 1929, and
Exhibit 562 bears the date of April 1, 1940.

Exhibit 563 was not received, it was excluded, but it was offered in evidence.

Mr. Bromley: Exhibit 561 was not received in evidence, was it, Mr. Knuff?

Mr. Knuff: It may not have been. I was under the impression that it had been. It was offered in evidence, although it may have been excluded. Whatever the record shows will of course govern.

Mr. Bromley: It was excluded; it is only an exhibit for identification.

Mr. Knuff: It is still a part of the Judge's book.

Justice Stephens: Yes, I, at least, have been keeping a set of all these exhibits, so that I can understand the record where reference is made to them, whether they have been admitted in evidence or not.

Mr. Knuff: Now, in connection with Government's Exhibit 605, which was identified and offered in evidence through Mr. Tice, being the soft copies of the Makowski patents, I also have copies for the Court. I do not have copies for the defendants.

(Copies of Government's Exhibits 561, for identification 562, 563 for identification and 605 were handed up to the Court.)

Justice Jackson: They can get all the copies they
5980 want down at Patent Office, can't they?

Mr. Knuff: That is right.

I would now like to have marked as Government's Exhibit 612 for identification certain answers of the United States Gypsum Company to the Government's interrogatories. This exhibit contains certain interrogatories and the answers to them of the United States Gypsum Company. It is prepared in exhibit form. We have, in the past, used some of the interrogatories and answers thereto, although we haven't used all of them, but in order to be sure that we have all the interrogatories and the answers thereto, of USG, which we think are material to the Government's case, we have taken out of the interrogatories of the Government and the answers of the USG, those that we want to introduce in evidence and have, as I say, combined them in exhibit form.

Exhibit 612 will be a Government's exhibit containing certain interrogatories on behalf of the United States of America and answers thereto by the defendant, United States Gypsum Company.

(The document referred to was marked as Government's Exhibit No. 612, for identification.)

Mr. Knuff: Government's Exhibit 613 for identification will be certain Government interrogatories and answers thereto by National.

5981 (The document referred to was marked as Government's Exhibit No. 613, for identification.)

Mr. Knuff: Exhibit No. 614 for identification will be certain interrogatories by the Government and the answers of Certain-teed.

(The document referred to was marked as Government's Exhibit No. 614, for identification.)

Mr. Knuff: Exhibit No. 615 for identification will be certain interrogatories by the Government and the answers thereto of Ebsary.

(The document referred to was marked as Government's Exhibit No. 615, for identification.)

Justice Stephens: Are these offered in evidence?

Mr. Knuff: Yes, I would now like to offer in evidence Government's Exhibits 612, 613, 614 and 615.

Justice Stephens: Is there any objection as to form, on the ground that these are copies, rather than the originals of the interrogatories and answers? If not, if there is any other objection?

Mr. Bromley: There is no objection as to form, subject to our right to compare them.

As to materiality and relevancy, I should like to
5982 have an opportunity to read them and find out just what it is that they are putting in. I would like to reserve that objection until the morning.

Justice Stephens: Very well, we will not rule on them until tomorrow morning, in order to give counsel and the Court both a chance to examine them.

5983 Mr. Knuff: Now I would like to have marked for identification as Government's Exhibit 616, a report of the Sales Department of the United States Gypsum Company, for the year 1926, addressed to Mr. S. L. Avery, and signed C. Henning, Vice President in Charge of Sales. Exhibit 616 for Identification has noted on the original, "Approved by Board of Directors, February (the date is indistinct) 1927", and it is signed by Mr. Bear, Secretary.

(The document referred to was marked for identification as Government Exhibit No. 616.)

Mr. Knuff: I would also like to have marked for Identification as Government's Exhibit 617, a report of the Sales Department of the United States Gypsum Company for the first quarter of 1927. It is addressed to Mr. S. L. Avery and is signed C. Henning, Vice President in Charge of Sales; and Exhibit 617 has noted on the original, "Approved by Board of Directors, May 11, 1927—R. G. Bear, Secretary."

(The document referred to was marked for identification as Government Exhibit No. 617.)

Mr. Knuff: I would like to have marked for identification as Government's Exhibit 618, a report of the Sales Department of the United States Gypsum Company for the first half of 1927, addressed to Mr. S. L. Avery and signed
5984 C. Henning, Vice President in Charge of Sales—and on the first sheet thereof appears the notation, "Approved by Board of Directors, August 11, 1927, R. G. Bear, Secretary".

(The document referred to was marked for identification as Government Exhibit No. 618.)

Mr. Knuff: I would like at this time to also have marked for identification, as Government's Exhibit 619, a six-page report of the Sales Department of the United States Gypsum Company, for 1927, addressed to Mr. S. L. Avery, and signed C. Henning, Vice President in Charge of Sales. Appearing on the first page thereof is the notation, "Approved by Board of Directors, February (I believe it is the 8th) 1928, R. G. Bear, Secretary.

(The document referred to was marked for identification as Government Exhibit No. 619.)

Mr. Knuff: I would also like to have marked for identification as Government's Exhibit No. 620, a five page exhibit headed, "Report of Sales Department—First Half 1928", addressed to Mr. S. L. Avery and signed C. Henning, and having a notation on the first page, "Approved by Board of Directors, August (I believe it is the 18th) 1928, R. G. Bear, Secretary."

(The document referred to was marked for identification as Government Exhibit No. 620.)

5985 Mr. Knuff: I would also like to have marked for identification as Government's Exhibit 621, a three-page exhibit headed, "Report of Sales Department—First Quarter 1929", addressed to Mr. S. L. Avery, and signed "C. Henning, V.P.S.", and having noted on the first page, "Approved by Board of Directors, May 8, 1929, R. G. Bear, Secretary."

(The document referred to was marked for identification as Government Exhibit No. 621.)

Mr. Knuff: At this time I would like to offer in evidence Government's Exhibits 616, 617, 618, 619, 620, and 621.

Justice Stephens: Is there any objection.

Mr. Bromley: I object to them as immaterial and irrelevant.

Justice Stephens: We haven't had an opportunity to examine them, and if there is serious contention on that we will have to ask counsel for the Government to demonstrate their relevancy and then we will have to read them and hear your objections to them, Mr. Bromley. What is the contention as to their relevancy, Mr. Knuff?

Mr. Knuff: Their relevancy, your Honor, is to show the competitive conditions in the gypsum industry for the years and for the periods specified by the various exhibits. They show just what the conditions in the industry were during

those years. They are reports of Mr. Henning to the Board of Directors. Take the first report, Exhibit 616 for
5986 identification. On page 3, under the heading "Sheetrock", in the second paragraph, it is stated:

"The Certain-teed competition is severe, due to the fact that they have made a price decline of ten per cent in all markets on both plaster wallboard and plasterboard. We have not as yet met this price decline. The larger markets in the East are being flooded by 'seconds' which are presumably 'firsts', and are changing $30 markets to $20 markets. We are meeting this competition where necessary to hold our—

Justice Stephens: (Interposing) In order not to get all this in the record, unless it is going to come into the record, just point out to us the parts which you think are relevant, the paragraphs which you think are relevant—or if that is sufficient you can make your argument based upon that.

Mr. Knuff: I think that, in general, will indicate the general scope of the offer. I can point it out paragraph by paragraph in each one, if desired.

Justice Stephens: You don't need to do that; we can read them.

Mr. Adams: If the Court please, may I add to Mr. Bromley's objection, one as to competency. If the purpose here is to prove what the conditions were in the industry, by a report of this kind, it seems to me that that is going beyond the proper rules. I might call the Court's attention to the fact that Mr. Henning is dead. I notice that
5987 Mr. Knuff read something there about what Certain-teed was doing. I don't admit that that is what Certain-teed was doing, and I don't concede that it can be proved in this way.

Justice Stephens: Well, they might be admissible as declarations of USG. They are hardly binding upon other companies as to the statements made by USG concerning those other companies.

Mr. Finck: Before ruling on these exhibits, if the Court please, may we have an opportunity of seeing them? We will try to do that tonight.

Justice Stephens: Yes, I think it would be better if we did not make a ruling on them until tomorrow, so that we may have a chance to look through them ourselves, and so that counsel may also have a chance to examine them.

(Judge Jackson's and Judge Garrett's copies of Exhibits 616 to 621, inclusive, for identification, were handed to Mr. Finck and Mr. Johnston, respectively, for use over the recess.)

Justice Stephens: Have defendants' counsel copies of these interrogatories and answers?

Mr. Finck: We do not have copies.

Mr. Knuff: I handed them over just a minute ago.

Mr. Adams: One set was handed to Mr. Bromley.

(Judge Jackson's and Judge Garrett's copies of these exhibits were loaned to defendants' counsel for use over recess.)

5988 Justice Stephens: Announce the recess until tomorrow morning at ten o'clock.

(Whereupon, at 4 o'clock p.m., the trial was recessed until Thursday morning, April 13, 1944, at 10:00 o'clock.)

5989 IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA,

Plaintiff,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS,

Defendants.

Seventh Floor,
Internal Revenue Building,
Washington, D. C.,
Thursday, April 13, 1944.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

APPEARANCES:

(Same as heretofore noted, with the following additional appearances:

WALTER G. MOYLE, ESQ., Washington, D. C., NORMAN WAITE, ESQ., Chicago, Ill., and ANDREW J. DALLSTREAM, ESQ., Chicago, Ill., for defendants Celotex and Dahlberg.

5994 Page 6233, from line 18 to line 23, inclusive, the Presiding Judge expressed himself so clumsily, using the plural in some instances and the singular in others, in referring to two exhibits, that the statement will have to be rewritten, I think, to read as follows—it will be easier to redictate it than to make the corrections:

"We are sorry, Mr. Steffen, but we are now convinced that Exhibits 401 and 402 are not admissible in evidence under the charges in the pleadings. We don't think that your last argument raises any new question. If they are not admissible for the reasons we have just stated, they are not admissible as admissions to prove the same thing for which they were offered."

Apparently the Court Reporter has a correction. Page 6258, line 6, the word "diamater" should have an "e" instead of an "a"—"diameter".

Thank you, Mr. Grover.

Does the Government have any corrections in the afternoon session?

Mr. Steffen: We have none, Your Honor.

Mr. Moyle: If Your Honor please, I would like to move the admission of two of my associate counsel, or rather, the main counsel representing The Celotex Corporation, from the Illinois Bar.

5995 This is Mr. Andrew J. Dallstream; and this is Mr. Norman Waite—both of the Illinois Bar, representing The Celotex Corporation, and one or both may desire to participate in the cross-examination.

Justice Stephens: You are admitted for the purpose of this trial, gentlemen; you are welcome here.

Mr. Steffen: We will proceed either with a ruling on the exhibits that were offered last night, or will call Mr. Dahlberg immediately.

Justice Stephens: I should think that perhaps we had better proceed with the witness so as not to take his time here while we are discussing the exhibits, unless the exhibits are to be entered without objection. Will there be contest on the exhibits, ruling on which was reserved?

Mr. Bromley: Yes, Your Honor.

6064 Mr. Adams: If the Court please, I should like to return to Exhibit 233, the so-called Redfield memorandum.

At the last session we suggested that the Government be called upon to give us some assurance that that memoran-

dum would be connected. The Government stated yesterday that they had a witness named Speer. They didn't say that he would connect it, but they said they thought he would. I suppose we can take it that they thus intended by that statement to give us the assurance which I understand we are entitled to under the cases.

Now earlier, when Your Honors' ruled upon this question, you said that it might be desirable, in the interest of saving the bringing of other witnesses, to call Mr. Dowd, because, if the Court found that Mr. Dowd had no such conversation, then the privilege was not waived, and
6065 that it would not be necessary to call any other witnesses with respect to it.

By good fortune, and by accident, Mr. Dowd is available, and it would seem to me that I might be able to be of some assistance to the Government and the Court in that respect, particularly as the Government has said that it intends to call Mr. Speer from, I take it, outside the city. I think he lives in Buffalo, or some place like that.

If I could call Mr. Dowd this afternoon, as I think the Court indicated I could in its earlier ruling, and if the Court could then make a determination on that phase of it, we might save the trouble of examining another witness with respect to that exhibit.

I therefore have Mr. Dowd here, and would like to have an opportunity to call him now.

Mr. Steffen: I would say this, Your Honor, as I told the Court last night, that we had gotten in touch with Mr. Speer, and that Mr. Speer was the man who made the invention which was in question, and he is referred to in Mr. Redfield's memorandum; and that I had requested him to come here and that I asked authority to subpoena him. Mr. Speer, I think, is now in the city, and therefore there is no possibility of saving any money on this matter.

When I said that I thought we could connect up the matter of Certain-teed and this memorandum, I said what
6066 any careful lawyer would say, that I expected by this witness to be able to establish that connection.

I have had a long distance telephone talk with him, just as I did with Mr. Stromquist, and if he will stand up under careful discussion with him as to what took place, and so on, as he did over the telephone, I am very sure that he will be able to connect the Certain-teed Company with the Redfield memorandum, and show that it was an authorized memorandum, and not something that blew in the window.

And I did that because Mr. Bromley and Mr. Adams both said that they didn't want to call Mr. Dowd unless they were sure that we were going to be able to connect this, and I told Your Honors that I felt that was a justified proposition, and that I would see whether I could connect it. I have made such efforts as I can, and I think that we have now in the city Mr. Speer, prepared to testify, that is, as soon as I can get over and talk with him; and our plan, as I told you last night, was to have him here tomorrow morning.

I should like to have the privilege of then putting on Mr. Speer. That seems a little odd, I might say, that they could get Mr. Dowd by this fortunate accident at this late date.

Mr. Adams: That is one of the characteristic insinuations of Government counsel, and if the Court wants me to state the reason that Mr. Dowd happens to be in
6067 the vicinity of Washington, I will.

Justice Stephens: No, the Court will not draw any inference that there is any impropriety on either side. We think the Government fairly did give the defendants an assurance that they would not expect them to produce Mr. Dowd unless the Government gave its professional assurance or made some showing of connection, and apparently the Government is attempting to do that through Mr. Speer.

Now we ruled, in summary, on this exhibit, that a prima facie showing on voir dire had been made of the waiver of privilege, so that in the absence of convincing contradictory evidence as to the fact or content of the asserted Redfield-Dowd telephone conversation, the exhibit would be admissible, subject to a showing that it is an admission by Certain-teed, and subject to the usual reservation—and that means subject to a showing of the conspiracy, aliunde, and a showing that the admission was in furtherance or execution of the conspiracy; but that Certain-teed might call Dowd; then the Court, after hearing his testimony, would rule as to whether the exhibit was admissible; and if it is received, it will be received subject to recall of Redfield for further cross-examination.

Now do you object, Mr. Steffen, to having Dowd on now while he is here? This controversy between you gentlemen now is largely a matter of order of testimony. Of
6068 course, normally the Government would make its case with respect to this exhibit first. In the ordi-

nary course we would hear the Government's testimony to qualify the exhibit first, and then hear Dowd afterwards.

Mr. Adams: May I say this, Your Honor, that at page 5892 of the record, Your Honor said, after we had discussed the return of Mr. Redfield for further cross-examination, that:

"Justice Jackson suggests that we hear the Dowd testimony first, and if we should then rule that there has been no telephone conversation, or that the contents do not constitute a waiver, then it might not be necessary to recall Redfield."

That is why we have Mr. Dowd here. He is here in town, and I might say that it would be extremely inconvenient to hold him over until tomorrow.

Justice Stephens: We are inclined to the view, Mr. Adams, that the Government ought to be allowed, in the absence of a showing of extreme inconvenience, to put on its case with respect to this exhibit first. It may not be ready to cross-examine Mr. Dowd until it first has a talk with Mr. Speer, or has some other preparation; and unless the inconvenience is very great, it would seem to us that we ought not to vary the usual order of the testimony.

Couldn't Mr. Dowd stay here until tomorrow?

Mr. Adams: I would like to say on that, that it
6069 would be a matter of grave inconvenience to Mr. Dowd, who actually should not be here. The Government said a week ago, or more than a week ago, that they would let me know about Mr. Dowd's testimony, and they never said a word about it until yesterday.

Now Mr. Dowd made all his other plans, involving a scheduled stop today in Philadelphia, and departing immediately from there to New York, and from there immediately to Chicago. All his transportation has been arranged, and it would be extremely inconvenient to him, and also would result in a serious business disadvantage to the company.

Justice Jackson: He didn't anticipate testifying when he came down here, did he? He just came here accidentally. What difference does it make? Call him some other time.

Mr. Adams: If he is here, why can't we use him?

Justice Jackson: Because we think it would be unjust to the Government to do it right now.

Justice Stephens: The Government might want to cross-examine Mr. Dowd, and if Mr. Dowd is going to leave tonight it might not have the opportunity to do so, it might not have the opportunity to prepare for cross-examination. If the exhibit is critical, the Government ought to have a fair chance to prepare its attack on Mr. Dowd's testimony, if any.

Mr. Adams: Mr. Steffen, do you object to calling
6070 Dowd today?

Mr. Steffen: Yes.

Mr. Adams: That is merely a matter of the Government's statement on that point. I certainly can do no more than to say that in all sincerity I was endeavoring here to comply with what I understood to be the Court's intention, that we should call Dowd first and then, if Your Honors were able to make a ruling prior to recalling Redfield—

Justice Stephens: (Interposing) I don't think that is quite correct, Mr. Adams. During the discussion of the admissibility of this exhibit, it is true that the suggestion was made by Justice Jackson that Mr. Dowd might be called first, and that might end the matter. But when the question of the admissibility of this exhibit was ruled on, and after the colloquy which succeeded that, it was made clear, for the convenience of defendants' counsel, that Mr. Dowd needn't come until the Government had either given assurance or made a showing of connection. So I don't think that any harm has been done.

Do you think it would be a serious disadvantage to you gentlemen to proceed to examine Dowd now?

Mr. Steffen: We are not prepared; I would much prefer to put it over until tomorrow morning, and the reason that I didn't tell Mr. Adams was because I wanted to make my own assurances as to whether I wanted to put on
6071 a witness to connect it, and I told him that I would do that. So I don't feel that we have been in any way misleading, Mr. Adams.

Mr. Adams: Maybe not intentionally, but I certainly have been definitely misled, and I have brought Mr. Dowd here with the hope that we could dispose of this today.

Justice Stephens: I am sorry, Mr. Adams, but I think that wouldn't be fair, under all the circumstances. If you want to hold him here until tomorrow morning, the Government will apparently put Mr. Speer on then; and then we could get Mr. Dowd disposed of and perhaps he wouldn't have to make another trip back here. Of course, he may

not have to anyway, we don't know what the Government is going to be able to show.

Mr. Adams: May I say this, Your Honor, that as I understood, Mr. Dowd's testimony is only testimony on the voir dire.

Justice Stephens: That is right.

Mr. Adams: And is not any part of the defendants' case.

Justice Stephens: It only goes to the preliminary question of fact bearing upon the admissibility of the exhibit. It doesn't go to the merits of the case.

Mr. Adams: As I understand it, the Government is drawing to the end of its case, and it is almost physically impossible for me, under the circumstances, to put in the proof which I regard as essential.

Justice Stephens: We will give you an opportunity, if the case reaches the point on the voir dire, 6072 that is if the Government makes such a showing, in view of the Court's ruling, as to connect the exhibit in the manner in which we have indicated it must be connected to make a prima facie showing, then you will be given an opportunity to call Dowd on voir dire, because we have ruled that that preliminary question of fact must be disposed of within the Government's case.

Mr. Adams: Well, I should like to point out only one thing further, Your Honors, and I am sorry if I appear to over-stress this point, but it is because I know of the inconvenience that will result from this order of proof,—that is that Mr. Steffen apparently wants to consult Mr. Speer. Mr. Speer could not under any conceivable state of facts have any knowledge about an alleged telephone conversation between Mr. Dowd and Mr. Redfield in June of 1940. It just couldn't be possible that Speer could have anything to do with it—

Justice Stephens: (Interposing) That isn't the subject on which it would be expected Speer would testify, Mr. Adams. He would testify, or any other witness they call would testify, we assume, under the Government's assurances, as to some fact on the basis of which the Court might connect this exhibit with Certain-teed as an admission.

Mr. Adams: Thank you, Your Honor.

Would Your Honors indulge me one moment?

6073 Justice Stephens: Yes, surely.

Mr. Adams: I have this one further suggestion, Your Honors. I have only, I think, four or five questions

to ask Mr. Dowd. It would seem reasonable that I might put him on, ask him those questions, and let the Government cross-examine him; and if they think, then, that they have to hold him over another day to examine him about four or five questions, they could do so.

Justice Stephens: I am sorry, Mr. Adams, we are all of the view that the normal course of presentation of the foundation for this exhibit ought to be followed. Mr. Dowd ought to remain here if he can, and if not he can come back later if needed.

Mr. Adams: Thank you, sir.

Justice Stephens: Now we have some rulings on exhibits to consider.

Mr. Knuff: 612 to 615, inclusive, were the interrogatories and the answers, respectively, of the United States Gypsum Company, National, Certain-teed, and Ebsary; and I believe the matter was left last night with the thought in mind that the defendants would like to compare what we had inserted in the exhibits with what they had included in their answers. I think that would be the first group that the Court should pass upon at this time.

Mr. Bromley: May it please the Court speaking
6074 now only for the defendants United States Gypsum Company, Avery and Knode, we have no objection to Exhibit 612 for Identification, being the answers of United States Gypsum Company to certain of the Government's interrogatories.

Justice Stephens: What have the other defendants to say with respect to that exhibit?

6075 Mr. Johnston: On behalf of Texas we object to Exhibit 612 as having no competency or relevancy or materiality, and as in no manner binding upon Texas.

Justice Stephens: Are there any objections from other defendants?

Mr. Oliver: We object on behalf of Celotex and Dahlberg.

Mr. Adams: I take it that all these objections will inure to the benefit of all the defendants without making it necessary for us all to state them?

Justice Stephens: That is correct.

Of course the statements of USG in response to interrogatories asked it, wouldn't be, without more, binding upon anyone else. But these may be offered in the nature of declarations of alleged co-conspirators, and I assume they are?

Mr. Knuff: No, they are not, your Honor. Exhibit 612 is simply offered as an admission of USG, not binding on

anybody else. Exhibit 613 is offered as an admission of National, not binding—

Justice Stephens: (Interposing) You don't offer them as binding upon anybody except the particular defendant?

Mr. Knuff: Not at all.

Justice Stephens: I was about to say that we would receive them, if you were, subject to the usual reservation, but if you are not offering them except to bind the particular parties which have answered them, then they are re-
6076 ceived for that purpose only. So Exhibit 612 is received as binding upon USG only.

(The document heretofore marked as Government Exhibit 612, was received in evidence.)

Mr. Finck: We have no objection to 613.

Justice Stephens: Exhibit 613 is therefore received as being offered for and as binding only upon National.

(The document heretofore marked as Government Exhibit 613, was received in evidence.)

Justice Stephens: How about Exhibit 614, Certain-teed?

Mr. Adams: Well, Certain-teed takes the same position except that as to Interrogatory No. 24, and the answer thereto, we object on the ground that it doesn't tend to prove anything in this case, and therefore is immaterial.

Justice Stephens: That answer is: "We are unable to supply the answer to this interrogatory from any company record or the memory of any present employee competent to speak."

Do you offer the interrogatory, Mr. Knuff, in view of that answer, to prove anything?

Mr. Knuff: No, your Honor, No. 24 can be stricken.

Justice Stephens: Very well; then we will receive Exhibit 614, except for Interrogatory No. 24, and the answer thereto, which are not offered, as to Certain-teed only.

Each of these exhibits is being offered and received
6077 as binding only upon the particular company that answered the interrogatories.

(The document heretofore marked as Government Exhibit 614 was received in evidence.)

Justice Stephens: Exhibit 615—Ebsary. Who is here representing Ebsary today?

Mr. Finck: I wouldn't undertake to admit anything for Ebsary, but I can find out by tomorrow morning from Mr. Varian, if you would like. I will call him tonight.

Justice Stephens: I should think there could hardly be any proper objection to it. At the same time, he has a right to be here and therefore we will reserve ruling on that until tomorrow morning, and you will get in touch with him, Mr. Finck. We will not rule on Exhibit 615 until tomorrow.

Mr. Knuff: Now if your Honor pleases—

Justice Stephens (Interposing): Who is local counsel for Ebsary?

Mr. Knuff: Tumulty and Tumulty.

Justice Stephens: That is right. Mr. Tumulty is not here, is he? Judge Garrett suggests, and I think properly, that if foreign counsel cannot be present, local counsel ought to be, so that we don't have to hold up our rulings. But in this instance we will suspend action on Exhibit 615 until tomorrow morning.

6078 Mr. Knuff: Now in connection with Government's Exhibits 616 to 621 for identification, inclusive, we offer these exhibits as declarations of a co-conspirator. They are not simply admissions of USG, they are offered as a declaration of a co-conspirator in furtherance of the conspiracy.

Mr. Bromley: We object to these exhibits, 616 to 621, inclusive, for identification, on the ground that they are incompetent, immaterial and irrelevant, and specifically, that they are incompetent and immaterial because they are not in furtherance of any conspiracy and could not possibly be so construed. Therefore, under the theory on which they are offered, they are neither material nor competent.

They are further incompetent because they are conclusions, and, at most, represent a lot of hearsay statements as to assumed conditions in the market.

Justice Stephens: Do any of the other defendants wish to be heard?

Mr. Adams: I stated yesterday, your Honor, that we wished to object so far as any statements concerning Certain-teed were concerned, as contained in these reports, on the ground that they could not possibly be binding on Certain-teed.

Justice Stephens: What do you offer to show by them—pardon me, Mr. Johnston, do you wish to be heard?

Mr. Johnston: In addition to what Mr. Bromley has said, I want to emphasize that they are merely inter-
6079 company communications of the United States Gypsum Company and have no bearing at all on anything that can bind Texas.

Mr. Finck: I would just like to record the objection of

National and Baker to these exhibits, as not binding upon them.

Justice Stephens: They are very voluminous documents, and must have a great deal of material in them that isn't of any importance. What paragraphs are you especially relying upon, and what do you want to prove by them?

Mr. Knuff: Does your Honor care which question I answer first? You asked two questions.

Justice Stephens: No, you can answer them in any order you please.

Mr. Knuff: We think they are in furtherance of the conspiracy and are descriptive of conditions that existed at the time of the conspiracy. We further think that they are admissions by USG of conditions that existed at the time of the formation of, and during the continuance of the conspiracy. There are statements in here that show the state of mind of USG.

Whether or not these statements are true, or whether or not they are not true, is immaterial. The statements are nevertheless declarations and admissions of USG.

They are offered on the same theory that the Court has passed on similar exhibits, that is Exhibits 328 to 332 inclusive, which appears at page 2864 of the record.

6080 Those exhibits were the exhibits relating to Mr. Avery's reports to the stockholders.

Justice Stephens: Yes, I remember those.

Mr. Knuff: The particular things that we rely upon here are contained in Exhibit 616, on page 3—

Justice Stephens: (Interposing) Will you carefully point out each paragraph in each exhibit that you rely on, because otherwise we are ruling in the dark. I went through these last night as well as I could, but they are very voluminous and I would like to have you be specific.

Mr. Knuff: The entire page 3 of Exhibit 616.

Justice Stephens: Let us look at that.

(The Court examines the portion of the exhibit indicated.)

Justice Stephens: Now what is the next?

Mr. Knuff: Exhibit 617, on page 2, beginning under the general subject "Sheetrock and Sterling", and continuing over to page 3, down to the general heading, "Partition Tile".

Justice Stephens: Let us read that.

(The Court examines the portion of the exhibit indicated.)

Justice Stephens: All right, the next.

Mr. Knuff: Now on the same exhibit, Exhibit 617, on page 4, under the general head, "General Competitive Conditions", and continuing through page 5, through
6081 page 6, through page 7, through page 8, and down to the heading, "California District".

Justice Stephens: Let us read that.

(The Court examines the portion of the exhibit indicated.)

Justice Garrett: Mr. Knuff, where these paragraphs refer to "wall board" as being sold by this company and that company, does that mean patented wall board, or not?

Justice Stephens: These antedated the patents, didn't they?

Mr. Knuff: No—which exhibit are you referring to?

Justice Stephens: I didn't mean that they antedated the patents, but the licenses.

Justice Garrett: I am reading from page 5 of Exhibit 617, where it says, "The Certain-teed Company are shipping into the Sea Board markets from their Texas mill, offering wallboard regularly," and so forth. I don't care to read it all into the record. Does that mean patented wallboard, or not?

Mr. Knuff: I don't believe that that paragraph on page 5 of Exhibit 617 has reference to patented wallboard, because at that time I do not believe Certain-teed was a licensee. Certain-teed did not become a licensee until May of 1929, and this report is for the first quarter of 1927.

Justice Stephens: Now as to Exhibit 618, what portions do you rely on?

6082 Mr. Knuff: Particularly page 3 of that exhibit, beginning under the main topic, "Plasterboard", and continuing over on page 4 down to the main topic, "Partition Tile." Also the last page of that exhibit, the 5th paragraph.

Justice Jackson: You mean starting with the words, "In general we are going through a keen competitive price,"?

Mr. Knuff: That is right. Also the last paragraph, the 5th and last paragraphs.

(The Court reads the portion of the exhibit indicated.)

Justice Stephens: Now as to Exhibit 619.

Mr. Knuff: Page 2, the first paragraph; then on page 4, beginning under the heading, "Plasterboard", and con-

tinuing down to the topic, "Partition Tile." On page 6, beginning with the topic, "General", and from there to the end.

(The Court examines the portion of the exhibit indicated.)

Justice Garrett: Would you refresh my memory about the meaning of "Sheetrock"?

Mr. Knuff: "Sheetrock" is a trade name that the United States Gypsum Company uses for their wallboard. Is that correct?

Mr. Bromley: Yes, for their patented wallboard.

Justice Stephens: Now, as to Exhibit 620.

Mr. Knuff: On page 2, the first paragraph; then on page
3, the paragraph under the heading, "Plasterboard",
6083 and continuing down to the paragraph marked,
"Partition Tile"; then on the last page of that exhibit, the paragraphs following the heading, "General."

(The Court examines the portion of the exhibit indicated.)

Justice Stephens: Now as to Exhibit 621.

Mr. Knuff: Particularly page 2, under the subheading, "Plasterboard", and extending down to the general heading, "Partition Title."

(The Court examines the portion of the exhibit indicated.)

Justice Stephens: We will take the afternoon recess at this time.

(Whereupon a short recess was taken, after which the trial was resumed as follows:)

Justice Stephens: Mr. Oliver, do you have a statement to make?

Mr. Oliver: If your Honor pleases, may I record my objection to Exhibits 616 to 621, inclusive, as not binding upon Celotex and Dahlberg.

Justice Stephens: Are there any other comments on any of these exhibits?

(No response.)

If not, the Court will rule.

The Court sees no distinction between these Ex-
6084 hibits 616 to 621, inclusive, and Exhibits 328 to 332
inclusive. Those least mentioned exhibits were ad-

mitted because they contained statements in the nature of admissions descriptive of the industry situation prior to the time of the 1929 license agreements. We were of the view that they were admissible as the admissions of a party, to-wit the admissions of USG, which might possibly be taken in connection with other testimony as a foundation for the Government's contentions with respect to the alleged reasons for entering into the license agreements.

We did not receive them as binding upon other parties unless shown to be in furtherance of the conspiracy, and unless the conspiracy itself was shown by evidence aliunde.

We see no distinction between the proferred exhibits, 616 to 621 inclusive, and 328 to 332 inclusive, in these respects.

We are not able to see, on the face of them, Mr. Knuff, how they may be said, at the present time, to be in furtherance or execution of the conspiracy. But we will receive them in evidence, particularly the portions referred to by counsel, as admissions of a party, to-wit USG, and not binding upon the other parties unless a conspiracy is shown aliunde, and unless the admissions are shown to be in furtherance or execution of the conspiracy.

Mr. Knuff: I think that ruling is consistent with the previous ruling, your Honor.

6085 (The documents referred to, marked as Government's Exhibits Nos. 616 to 621, inclusive, were received in evidence.)

Justice Stephens: We note, Mr. Knuff, that in part the exhibits just received cover the same years as those previously received, but they are more detailed than the former exhibits.

Mr. Knuff: That is correct.

Justice Stephens: The former being more generalized.

Mr. Knuff: Yes, your Honor.

Mr. Bromley: May it please the Court, the Court's ruling on Exhibits 328 to 332 inclusive, appears at page 2873 of the record, and as I understood that ruling it was that those exhibits would be received as binding only on USG.

I do not understand that in that ruling the Court indicated that the production of any other proof of any kind could transform that evidence into the declarations of a co-conspirator; that no matter what evidence was received, that those documents remained merely as admissions binding only on USG, because that ruling said specifically that

they were not in furtherance or execution of any conspiracy.

Justice Stephens: Well, that is true, Mr. Bromley. We have been receiving dozens of declarations or admissions of various parties here in the case which didn't, on their face, seem to be in furtherance or execution of the
6086 conspiracy, however, subject to the usual reservation, which reservation has always embraced two items, first, that the conspiracy must be shown, aliunde the declarations or admissions; and second, that the declaration or admission must be shown to be in furtherance or execution of the conspiracy.

Suppose, with respect to Exhibits 328 to 332, some evidence should come into the record later, which showed that those admissions were in furtherance or execution of the conspiracy. It is difficult to see how such evidence could show that, but if it could show that, wouldn't they then become admissible, provided also a conspiracy had been shown aliunde, that is, admissible against all defendants?

Perhaps it is a highly technical conception, but isn't it theoretically correct, to make the reservation with respect to any type of an admission?

Mr. Bromley: I think that probably is theoretically sound, but I don't understand that there is any offer here to connect these any further.

Justice Stephens: Is there? Do you expect to connect these any further?

Mr. Knuff: We think they have already been connected, and we will point out at the proper time the connection.

Justice Stephens: We disagree with you there. We don't see, at present, anything in the record which indicates that these exhibits which are now being considered, any
6087 more than Exhibits 328 to 332, are themselves in furtherance or execution of the alleged conspiracy, and if you think there is something to that effect, you ought to point it out to us now.

Mr. Knuff: Well, I am not prepared to do so now. We thought that that would arise on the question of a motion to dismiss, whether or not the conspiracy had been shown, and at that time we will be prepared to point out the matters that we think show clearly the existence of a conspiracy.

Justice Stephens: I am not asking you about the existence of the conspiracy, I am asking you about evidence

showing that these admissions were in furtherance or execution of the conspiracy.

Mr. Knuff: Maybe I didn't state myself clearly, your Honor.

We will, at that time, endeavor to point out how they furthered the conspiracy.

Justice Garrett: That will be a matter of argument.

Mr. Knuff: Yes, that is a matter of argument.

Justice Stephens: Well, that is true, but of course in a case as complicated as this, it has been necessary to take a lot of items of evidence into the record subject to connection, subject to motions to strike.

We are trying to avoid all reserved rulings, so far as possible, and we thought if you could show us now how these are in furtherance or execution of a conspiracy,
6088 we might be able to rule more explicitly.

Justice Jackson: Well, your stand is that you have already proven a conspiracy.

Mr. Knuff: We think so, your Honor.

Justice Jackson: And of course the defendants will argue that you haven't.

Mr. Knuff: Yes, your Honor.

Justice Jackson: And later on we will determine who is right.

Mr. Knuff: Yes.

Justice Stephens: That isn't exactly the thing that is concerning me at the moment. That is a matter of course, which we will have to hear argument on later. Mr. Bromley's argument is that these admissions, on their face, cannot be in furtherance of the conspiracy, and therefore they ought to be received at the present time only as binding upon USG. I am inclined to the view that that is correct, and that is the reason that I made these reservations, that these exhibits are admitted only as admissions of USG, and at the present time are only binding upon USG and are not binding upon anyone else, unless there is some further showing made, first as to a conspiracy, and second as to the admissions being in furtherance or execution of the conspiracy.

That seems to me to protect the other defendants, Mr. Bromley, because if we are not shown anything, or
6089 convinced by any other argument, that there is anything presently in the record which makes these admissions in furtherance or execution of the conspiracy, then they stand right where they are now, binding only upon USG.

Mr. Knuff: I want to take up next, if your Honor please, the requests for admissions that we have served on certain of the other defendants, and I had thought at this time to call up the requests on Certain-teed. However, I don't see Mr. Adams here.

Justice Stephens: Mr. Marshal, ask Mr. Adams to return, will you?

(Mr. Adams returned to the courtroom.)

Justice Garrett: The Clerk has handed me a batch of papers. Aren't these all in these several—

Mr. Knuff: (Interposing) Requests for admissions?

Justice Garrett: Yes.

Mr. Knuff: They are, your Honor, but we thought, since you would want a copy of each pleading, that you wouldn't want to tear one pleading apart and put it in the exhibits, and that is the reason we gave you an additional set of them.

Justice Garrett: All right, thank you.

Incidentally, I notice that Certain-teed and National have answered, and that USG has not.

Mr. Knuff: USG has answered.

Justice Garrett: Well, I have no copy of its answer.

6090 Mr. Knuff: I can't speak for them. They served a copy of their answer on me.

(There was a discussion off the record.)

Mr. Bromley: While we verified and served a response to the requests for admissions, we did not file it, understanding the law to be that this is an extra-judicial proceeding, with which the Court has nothing to do, and that it is not proper for Government counsel to call it to the attention of the Court or to ask the Court to pass on it, or make any ruling with respect to it.

If a party upon whom a request for admissions as to genuineness is served, files an answer and does not admit any of the requests, there is nothing that the Court has any power to do about it,

The rule says that the Government should then proceed to prove the documents in the regular way, and assess the expense against the party who has failed to admit genuineness.

So we conceived of this as an extra-judicial proceeding which it was not proper to bother or burden the Court with.

As far as our admissions are concerned, and of course in our case we admitted most of the documents, all the Government has to do is offer them in evidence and our admission stands as a bar to any objection on the ground of incompetency because of lack of identification.

Justice Garrett: Thank you for that explanation.

6091 Justice Stephens: What is that Rule?

Mr. Knuff: It is Rule 36, your Honor.

Justice Stephens: That has been my view. I suppose that is without contest, isn't it, Mr. Knuff, that the Court has nothing to do with this matter unless you need to call the attention of the Court to the fact, if it be a fact, that—well, let me put it this way:

The rule provides:

"Each of the matters of which an admission is requested shall be deemed admitted unless, within a period designated in the request, not less than 10 days after service thereof or within such further time as the court may allow on motion and notice, the party to whom the request is directed serves upon the party requesting the admission a sworn statement either denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully either admit or deny those matters."

Unless that aspect of the rule has to be called to the attention of the Court, so as to lay a foundation for an implied admission, through failure of the opposite party to serve, as provided in the rule, there is nothing for the Court to do, is there; if these documents have been admitted as to genuineness, then you simply offer them, don't you, and call our attention to that, and if the defendants, on the other side, don't deny it, then we discuss the

6092 question of relevancy and materiality?

Mr. Knuff: I think that is correct. The reason the Court was given copies of the requests is because I construe the rule—I can't seem to locate it right now—that every notice served upon the other side shall be filed, within a reasonable time, and since we served this on the other side, I construed this rule to mean that I would have to file the notice in court.

Justice Stephens: Well, there is no harm in doing that, of course.

Mr. Knuff: Will the Court pardon us just a moment, please?

Justice Stephens: Yes, indeed.

(Government counsel conferred together.)

Justice Stephens: Before we proceed further, the Court would like to reiterate and expand a little its statement informally made before the recess that each of the defendants ought to have some representation in this courtroom at all times. We realize that lawyers who have a small office staff, are under difficulty in attending a long trial like this at all times, but we think that either local counsel should be here, or if not, that some arrangement should be made with the lawyers who are here regularly, to speak for such defendants as are not represented, and each of them, because we ought not have to postpone rulings, or rule in the absence of representation.

6093 Perhaps I am whipping, in these statements, the absent counsel who are not here to receive the whip, and perhaps we will have to communicate with them through the Clerk; but possibly you can informally indicate to them, if you have contact with them, that they ought to have representation here at all times.

Mr. Bromley: We will assume the burden of communicating that information to those who are not here.

Justice Stephens: Thank you very much, Mr. Bromley.

Justice Garrett: Mr. Knuff, I would like to ask you, before you begin having these exhibits marked for identification, do you propose to have all of them marked, or just those that have been admitted here?

Mr. Knuff: Just those that have been admitted.

Justice Garrett: I don't think that Certain-teed has admitted to any exhibits.

Mr. Knuff: Yes, your Honor, they have.

Justice Garrett: Well, then, I misread their statement. National has, I know.

Mr. Knuff: When I said I was only going to offer those that had been admitted, I misspoke myself. We think that there are some, particularly of the United States Gypsum Company, where they have not admitted them, that we are going to offer anyway on the ground that they are circumstantially admitted by another admission that they have made in here.

6094 Justice Garrett: Thank you.

Mr. Johnston: I would like to have the record show that we, who did not receive these requests for admissions, of course don't know anything about what they

are. In this bunch of exhibits there are probably two or three hundred pages, none of which I have ever seen.

Justice Stephens: Well, even if the defendants to whom these exhibits immediately relate, have admitted their genuineness, we still have the question before us, Mr. Johnston, of materiality and relevancy, on the pleadings, of each one of them, and we will have to examine each one of them as it is offered in evidence, and you will have an opportunity at that time, at least, to see it and you can borrow one of these sets also during the evening's recess.

Mr. Johnston: That is what I wanted to be understood.

Mr. Knuff: I think Mr. Johnston possibly has misspoke himself because on Tuesday evening, in my office, in the prerence of Mr. Steffen, I handed over to Mr. Johnston the very documents that I am now going to offer, gave him copies of them, on Tuesday afternoon.

Mr. Johnston: When I was in counsel's office, he returned to me the documents of Texas that we had delivered to him; and then he handed me a package, which I did not open, but delivered to Mr. Bromley, as chief counsel, and I don't know what was in the package.

6095 Justice Stephens: Very well, we will see that you have time to examine each one of these exhibits.

Mr. Knuff: I would like to have marked for identification Government's Exhibit 624 through 640.

Exhibit 624 is a statement, signed by George P. Krug, sworn to on the 20th day of August, '29; Exhibit 625 is a statement signed by George P. Krug and sworn to on the 17th day of September, 1929; Exhibit 626 is a statement, signed by George P. Krug, sworn to the 21st day of October, 1929; Exhibit No. 627 is a statement, signed by George P. Krug, sworn to on the 20th day of November, 1929; Exhibit 628 is a statement, signed by George P. Krug, and sworn to the 20th day of December, 1929; Exhibit 629 is a statement, signed by George P. Krug, and sworn to on the 20th day of January, 1930; Exhibit No. 630 is a statement, signed by George P. Krug, sworn to the 3rd day of March, 1930; Exhibit 631 is a statement, signed by George P. Krug, sworn to on the 15th day of March, 1930; Exhibit 632 is a statement, signed by George P. Krug, sworn to the 16th day of April, 1930; Exhibit 633 is a statement, signed by George P. Krug, sworn to the 14th day of May, 1930; Exhibit No. 634 is a statement signed by George P. Krug, and sworn to the 17th day of June, 1930; Exhibit 635 is a statement, signed by George P. Krug, and

sworn to the 15th day of July, 1930; Exhibit 636 is a statement, signed by George P. Krug, sworn to the 14th
6096 day of August, 1930; Exhibit 637 is a statement, signed by George P. Krug, sworn to on the 15th day of September, 1930; Exhibit 638 is a statement, signed by George P. Krug, sworn to the 18th day of October, 1930; Exhibit 639 is a statement, signed by George P. Krug, and sworn to the 14th day of November, 1930; and Exhibit No. 640 is a statement, signed by George P. Krug, sworn to the 17th day of February, 1931.

(The documents referred to were marked for identification as Government's Exhibits Nos. 624 to 640, inclusive.)

Mr. Knuff: The genuineness of these exhibits, so marked for identification, is not denied by Certain-teed.

Mr. Adams: Your Honor, I have to differ with the statement.

The first of the requests for admissions was that these statements were signed by George P. Krug on behalf of Certain-teed Products Corporation. That we admit.

Justice Stephens: I can't hear you, Mr. Adams.

Mr. Adams: That fact we admit; we admit that they were signed by Mr. Krug.

Justice Stephens: You admit that Exhibits 624 to 640, inclusive, were signed by George P. Krug?

Mr. Adams: That is correct. But I do not admit—which counsel stated that I did—the genuineness of these documents.

6097 Justice Stephens: I don't quite see the distinction. If he signed them in his capacity as auditor, you don't contend that he signed them improperly, do you, or without authority?

Mr. Adams: No, your Honor, but there are handwritten portions of these documents which we do not admit. I just wanted to make that clear. There is no question but what Mr. Krug signed the documents, and also that they are Certain-teed's documents, but later on somebody else wrote certain things on them.

Justice Jackson: Are they admitted, then, except for the handwriting that appears on them?

Mr. Adams: Yes, although there is one further limitation that I should state, and that is that we do not admit that Exhibits 628 to 640, both inclusive, are statements of plaster wallboard and gypsum wallboard manufactured and sold by Certain-teed Products Corporation, license un-

der agreement dated May 22, 1929, between United States Gypsum Company and Certain-teed Products Corporation, during the various periods referred to in those exhibits, since the plaster wallboard and gypsum wallboard manufactured and sold by Certain-teed subsequent to November 5, 1929, was manufactured under a license agreement with the United States Gypsum Company, dated October 15, 1929, and not dated May 22, 1929.

Each of these exhibits, your Honor, subseqeunt to Exhibit 627, to and including 640, and I believe some after that—

6098 Justice Stephens: (Interposing) And including Exhibit 628?

Mr. Adams: Including Exhibit 628—state at the top, as your Honors will see, that it is a statement of plaster wallboard and gypsum wallboard manufactured and sold during the period named on each exhibit, by Certain-teed Products Corporation, licensed under agreement dated May 22, 1929, between United States Gypsum Company and Certain-teed Products Corporation.

Justice Stephens: Well, Mr. Knuff?

Mr. Knuff: The way these exhibits are here is the way we received them from USG. They were reports, I presume, that Certain-teed filed with USG. USG handed these reports over to us, and we photostated them, just as we received them from USG.

Mr. Adams: I am not raising any suggestion that there has been any change made by the Government in these exhibits. I am merely stating that we cannot admit what is obviously not a statement of truth.

Justice Stephens: In other words, you reserve the right to contend—and you do not admit—that Mr. Krug's statement as appears at the top, or as the title, is correct, for the reasons you have just stated.

Mr. Adams: That is right, your Honor.

Justice Stephens: Well, it seems to me, Mr. Knuff, that with respect to those exhibits, the correctness of which is in dispute, you will have to call a witness, won't you?

6099 Mr. Knuff: After they have admitted the genuineness of the signature, your Honor? If there is a mistake here, it is a mistake that can be explained at the proper time by Certain-teed. They have admitted that this signature is genuine. I think that there is a mistake, personally. I think that it was a mistake on the part of Certain-teed; I think Certain-teed should have said that it was

under an agreement dated such-and-such a date in November. But it was Certain-teed's mistake, not ours.

Mr. Adams: I don't know whose mistake it is—

Justice Stephens: (Interposing) The Court isn't interested in that, either. The Court is interested in getting things in that are true and correct.

Mr. Adams: As I take it, your Honor, under the Rule, I can be required to admit the genuineness of documents. I think I have admitted that. The precise language of this request for admission is somewhat important here.

They ask first whether: "The following statements, photostatic copies of which are attached hereto, made a part hereof, and marked Exhibits 1 through 34 (which include the exhibits now under consideration) were signed on behalf of Certain-teed Products Corporation by Geo. P. Krug."

The answer is yes.

But I do not say that the alleged statements of fact appearing on the papers signed by Mr. Krug are true,
6100 and I cannot be required so to admit.

Justice Stephens: This is a novel situation, and we will have to discuss it with counsel.

How are you in any different situation, Mr. Adams, than you would be if Mr. Krug were called to the witness stand? Suppose he was called to the witness stand and handed this document, and asked if he signed it, and he said yes, and stated that he signed it as the general auditor of Certain-teed. That would identify it, wouldn't it?

Mr. Adams: There is no question about that, we admit that he signed these, and moreover that he signed them on behalf of Certain-teed.

Justice Stephens: Of course, these are being offered as Government exhibits. Is it your contention that you are entitled to have Mr. Krug here to cross-examine him as to the correctness of the statements contained in these exhibits?

Mr. Adams: Yes, your Honor.

Justice Jackson: What statement is it that you say is incorrect, merely the date of the license?

Mr. Adams: Yes.

Justice Jackson: And that is the only point, is it?

Mr. Adams: I think I should go further, if I may be permitted to do so, your Honor, since we are discussing this whole matter.

I don't know whether your Honors have before
6101 you the requests for admission, but No. 4 of the requests is—

Mr. Knuff: I haven't taken that up as yet.

Mr. Adams: I know that, and I don't know whether I am premature on this or not, but I think I should say that No. 4 of the requests for admissions, asks us to admit that:

"The statements of fact contained in Exhibits 1 through 64 are true."

Exhibits 1 through 64 include the exhibits now under discussion.

Well, now, in my reply, I have refused to admit that the statements of fact contained in these exhibits are true, and I take the position that if the Government desires to prove these facts, they are required and compelled to produce the witness here so that we can cross-examine him; and as a matter of fact, the notice is improper in form, under the cases, in any event, since the cases hold that you cannot hand your adversary a document and ask him to admit that the statements of fact contained therein are true, because that places upon him the burden of deciding what is a statement of fact and what isn't, at his peril. You must, rather, ask him to admit what facts are true and are not true. That has not been done by the Government in this case.

Justice Stephens: What is that rule again, Rule 36?

Mr. Knuff: Rule 36, your Honor.

Justice Stephens: (Reading) "At any time after
6102 the pleadings are closed, a party may serve upon any other party a written request for the admission by the latter of the genuineness of any relevant documents described in and exhibited with the request or of the truth of any relevant matters of fact set forth therein."

The party who receives such a request is, of course, not obliged to grant it. It would seem to me, Mr. Knuff,—I will be glad to hear you and my colleagues will also of course—that all you have shown so far by the admission of Certain-teed is the genuineness of the documents, in the sense that they have been identified as documents signed by an auditor of the company, Mr. Krug.

But if there is a dispute, or the absence of an admission as to the correctness of what is in these documents, since the Government is relying upon them, and offering them, I have some difficulty in seeing how you can avoid calling a witness for cross-examination.

Mr. Knuff: Well, here is the position I take. Suppose we forget for one moment that there has been a request for the admission of the genuineness of these documents, and suppose we have George P. Krug on the witness stand. Then I would ask Mr. Krug, "Is this your signature?" And he would say, "It is."

Passing for one moment the relevancy and materiality, or anything like that, I would then offer these documents in evidence, and they would be, prima facie, admitted.

6103

Mr. Adams: Then we could cross-examine Mr. Krug.

Justice Stephens: Yes, because we have ruled a dozen times here that where you call a witness to the witness stand and have him identify a document, and thereby accredit it, you have opened the door to cross-examination as to the correctness of the document, because you are offering it to the Court as correct.

Justice Jackson: Are you questioning the mathematics and figures on these, Mr. Adams? Do you want to cross-examine your own auditor as to that?

Mr. Adams: He is not our own auditor.

Justice Jackson: He was then, though?

Mr. Adams: Yes.

Justice Jackson: You want to question him on that, do you?

Mr. Adams: I have, myself—

Justice Jackson: (Interposing) If you do, you haven't any other recourse except to call him.

Mr. Adams: May I go further, your Honor, in answer to Judge Jackson's inquiry? This includes this whole group of exhibits. We have been requested to admit a lot of other facts which we think we ought to have an opportunity to examine witnesses about.

As far as I am concerned, I have gone just as far as I can by admitting that these are—there is no question about it—authentic documents on our part.

6104

Justice Stephens: This rule, Mr. Knuff, is a Rule of convenience to try to save the necessity of proving facts which can be admitted, and of proving signatures, which can be admitted. But I am fearful that your position that when you have once had a witness testify to a document, in the sense of identifying the signature upon it, and stating that it is a document that he signed, that that puts the document in for all purposes, without cross-examination, cannot be sustained.

The Court ought to know, before the close of the Government's case, what every exhibit means, and we can't tell what it means unless the opposite party has had an opportunity to cross-examine on it, if you rely upon it for the statements therein, as you undoubtedly do.

Mr. Knuff: We are not asking Mr. Adams at this time to make a binding admission, we haven't come to that, and I am not going to ask Mr. Adams to make a binding admission that the facts stated therein are true. I don't care whether they are or not for the purposes of the Government's case.

We say that we have made up a prima facie admission on the part of Certain-teed, and that is what we are offering these for, as prima facie admissions. If they want to deny them at the proper time, that is all right, we don't care. We are not asking them to make an admission
6105 now that will forever bind them from questioning the authenticity or the genuineness or the correctness of these documents.

Justice Stephens: But you do not meet the point that troubles me, and I think troubles my colleagues. You say you are offering it only as a prima facie admission. Well, what you apparently mean by that is that once you get these documents in as prima facie admissions, the defendants are not permitted to attack them until they get to their part of the case. Well, now, I don't think that is the law on the procedure with respect to trials.

This Rule 36, which has to do with admissions, is a rule of convenience, with the idea of saving time for the Court and counsel, but it doesn't abolish the rules of evidence or the right of cross-examination.

If you put a document in, in your direct case, as the Government's document, and the defendants haven't admitted the correctness of the statements of fact therein, the Court has a duty to find out, and defendants' counsel have a right to attempt to show the Court, that it is not correct, if it is not correct, before it is considered as a part of the Government's case, because the Court must know, before the close of the Government's case, what it can rely on and what it can't rely on, with respect to every item of evidence, and what that means; if it has a
6106 meaning different from what it says on its face, and that can be brought out on cross-examination, the Court ought to know it, as a matter of duty, and defendants' counsel have a right to bring that out.

I don't see how you can escape, if there is a dispute as to the contents of these documents, in any particular, how you can escape the necessity of subjecting the witness who prepared them, to cross-examination.

I will say this, however, to Mr. Adams, that we think he ought to go to such limits as he possibly can to make admissions in these matters, because the time of the Court can be very greatly saved if that great mass of material can be put in through Rule 36, rather than through the lips of witnesses under cross-examination.

Mr. Adams: I quite agree, your Honor, with that. But you see one difficulty that I have here is that we are being asked to admit wholesale statements of fact contained in these exhibits. I simply cannot do it. These documents did not come out of our files.

Justice Jackson: They came out of the files of the United States Gypsum Company, did they not?

Mr. Adams: That is right.

Justice Jackson: And they were reports from your company to United States Gypsum Company, weren't they?

Mr. Adams: That is correct.

Justice Jackson: Didn't you have copies of them?

6107 Mr. Adams: No.

Justice Jackson: Is Mr. Krug available?

Mr. Adams: I have no idea where Mr. Krug is. He is not in our employ. But I wanted to call your Honor's attention to one case, which is the only case I could find on the subject, which I think, had the Government followed, might have facilitated this matter.

In that case the court held that the proper practice is for the party seeking the admission to ask the other party to admit facts. Now we haven't been asked to admit facts. Every place I have been asked to admit a fact, I have done so, where I could. But they go ahead and say that they want admissions that the statements of fact contained in these exhibits are true. I don't know what facts they are talking about.

Mr. Knuff: As I said, I haven't come to that portion of my request at all. What I have now offered goes simply to Paragraph 1 of my request, that is, a request for an admission that:

"The following statements, photostatic copies of which are attached hereto, made a part hereof, and marked Exhibits 1 through 34, were signed on behalf of Certain-teed Products Corporation by Geo. P. Krug."

Justice Stephens: That has been admitted by Mr. Adams.

Mr. Knuff: And that is all I am asking at this time for Certain-teed to admit.

6108 Justice Stephens: Very well, perhaps this is all unnecessary. Perhaps there is nothing before the Court. Mr. Adams, I thought, however, was objecting to the admission of these documents on the ground that they were not correct, and he ought to have a chance to cross-examine on that.

Mr. Adams: I think I precipitated that in trying to answer a question by Judge Jackson. I wanted to make it perfectly clear that while we admit the genuineness of these documents, we cannot admit what is in them.

Justice Stephens: Then, at the present time, there is nothing before the Court.

Mr. Johnston: Let me call the Court's attention to this fact, that if this class of exhibit is to be admitted under these circumstances, then we, who represent other defendants, are foreclosed from any right or opportunity to cross-examine any witness about them, and I don't know what is in them. I imagine that there are some, at least, about which we would like to make inquiry, and if this procedure is followed, then we have no opportunity at all to make any inquiry about any of these exhibits.

Justice Stephens: Well, your rights might be protected, so far as that is concerned, by a ruling that they will bind only the persons who make the admissions. I don't think this Rule is limited to a case with only one defendant.

However, there is nothing before the Court at the present.

6109 The Court has this suggestion to make to you, Mr. Adams and Mr. Knuff. Why can't you, informally, since there appears to be no dispute between you, stipulate that that date is in error up in the title of this exhibit, or these exhibits, concerning which you were speaking?

Mr. Knuff: I will stipulate right now that it is probably a mistake. I think it is; I think I told the Court that it was. I make no point of anything that is included in the capital letters at the top of these statements at all. It is only a matter of identification, that is all.

Justice Stephens: We will now adjourn until tomorrow morning at ten o'clock.

(Whereupon a recess was taken at 4:10 o'clock p. m. until 10:00 o'clock a. m. of the following day, April 14, 1944.)

6110 IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA,

Plaintiff,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS,

Defendants.

Seventh Floor,
Internal Revenue Building,
Washington, D. C.,
Friday, April 14, 1944.

The above-entitled cause came on for further hearing at 10:00 o'clock a. m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

APPEARANCES:

(Same as heretofore noted.)

6116 Mr. Tumulty: May it please the Court, my attention was called, following the afternoon session yesterday, to the desire expressed by the Court that all defendants be represented at all times, either by foreign or

local counsel, or by some arrangement with some of the counsel who are here.

I have conferred with Mr. Varian regarding that, and he asked me to express his regret that he had found it impractical to be here all the time, and to say that after considering the matter we feel the best solution of it is to authorize Mr. Finck, one of the counsel who expects to be here, to act for Ebsary, with full authority to make any admissions or objections as matters are raised in the course of the trial. As a matter of fact, Mr. Varian had requested that Mr. Finck enter objections for him, but apparently that authority wasn't broad enough to cover the mat-
6117 ter that came up yesterday.

I also want to express our regret that that omission has possibly caused some inconvenience to the Court.

Justice Stephens: No serious inconvenience. We simply wish to avoid inconvenience in the future, Mr. Tumulty. There apparently will be a great many offers of documents from now on, and there may be a good deal of colloquy and objection, and someone ought to be here to represent each defendant. Thank you for appearing, and for your explanation.

Are there any other defendants who are not represented? I suppose not, now. Mr. Adams is here for Certain-teed; Mr. Finck for National; and I guess everyone else is represented.

That makes it possible to make a ruling and clear the record, Mr. Knuff, on Exhibit 615. That was one of the interrogatory exhibits, the one for Ebsary.

Is there any objection to that, Mr. Finck, on the part of Ebsary?

Mr. Finck: No, Your Honor.

Justice Stephens: Then Exhibit 615 is received in evidence as binding only upon the particular company, to-wit, Ebsary, which answered the interrogatory.

(The document referred to, marked as Government's Exhibit No. 615, was received in evidence.)

6118 Justice Stephens: Are there witnesses present this morning that we can call to the witness stand, before proceeding to other colloquies which might take more time?

Mr. Steffen: Mr. Speer is here, Your Honor.

Justice Stephens: You may call him, then, and we will proceed to these other matters afterward.

Thereupon, ALEXANDER S. SPEER called as a witness for and on behalf of the United States, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Steffen:

Q. Will you state your full name, Mr. Speer? A. Alexander S. Speer.

Q. And where do you live, Mr. Speer? A. 108 Depew Avenue, Buffalo.

Q. Buffalo, New York? A. Yes.

Q. How long have you lived there, Mr. Speer? A. Twenty-four years.

Q. Were you at any time connected with one of the gypsum companies? A. First with Beaver Products, and then with Certain-teed.

6119 Q. And about what years were you connected with the Beaver Products Company? A. In 1919.

Q. And in what capacity, Mr. Speer? A. I was a consulting engineer.

Q. And do you recall that at some time the Certain-teed Products Company took over the Beaver Products? A. Yes, sir.

Q. Do you remember about when that was? A. 1928. I don't know the exact date.

Q. I think it has been testified to as being April, 1928. A. All right.

Q. Did you continue with the Certain-teed Products Company in the same capacity? A. Yes, sir.

Q. And that was what, Mr. Speer? A. As a consulting engineer.

Q. Consulting engineer? A. Yes.

Q. And how long did you continue with Certain-teed Products as a consulting engineer? A. Well, I am still under contract.

Q. I want to know—

Justice Jackson: (Interposing) Are you still
6120 with them as a consulting engineer?

The Witness: I still have a contract on account of certain patents.

By Mr. Steffen:

Q. What did you do as a consulting engineer for Certain-teed? A. Well, my duty was to produce improved articles.

Q. Of what sort, Mr. Speer? A. Well, in the roofing

line, and also plasterboard and beaverboard, and wallboard in general.

Q. And did you ever take out any patents on your work? A. Yes, sir.

Q. Could you tell us roughly how many—or what you did? A. Well, I think it is a little over 80 or a hundred.

Q. Patents? A. Yes, sir. Altogether, since I started, not since I was with the Beaverboard.

Q. You mean that is since you started with Certain-teed, or all-told, both with Beaver and Certain-teed? A. It would be about 40.

Q. For Certain-teed? A. For Beaverboard and Certain-teed.

Q. Did you at any time work on an invention or a
6121 device for making a closed-edge board? A. Yes, sir.

Q. Can you tell us about when that was? A. About 1924 or 1925, or it may be earlier.

Q. And did you ever file an application for a patent on that? A. Yes, sir.

Q. On a closed-edge board? A. Yes, sir.

Q. Did you ever make any samples of the board that you were working on? A. Yes, sir.

Q. And did you do that before you made application for a patent? A. Yes. My policy always has been to make the articles first and then apply for the patent afterward.

Justice Garrett: Will the witness kindly raise his voice a little? I am having some difficulty in hearing him.

By Mr. Steffen:

Q. Will you please talk louder, Mr. Speer, for the Court? A. Yes, sir.

Justice Stephens: When did you say you first commenced to work for Beaver?

6122 The Witness: In 1919.

Justice Stephens: And when for Certain-teed?

The Witness: In 1928.

Justice Stephens: Thank you.

By Mr. Steffen:

Q. I now want to show you Mr. Speer, what has been marked as Government's Exhibit 641 for Identification.

(The article referred to was marked as Government's Exhibit No. 641 for Identification.)

By Mr. Steffen:

Q. I will ask if you can tell us what that is?

(Government's Exhibit No. 641 for Identification was handed to the witness.)

A. This is a closed-edge board.

Q. And do you know how it was made, or who made it? A. I know how it is made.

Q. Who made it? A. I had a man assisting me to make it.

Q. It was made by you or under your supervision? A. Yes.

Q. At about what time?

Mr. Johnston: We can't hear the witness at all, down here.

Justice Stephens: Raise your voice, if you can,
6123 Mr. Speer.

By Mr. Steffen:

Q. Do you remember about what time that was made, Mr. Speer?

Justice Jackson: You mean this particular exhibit?

Mr. Steffen: Yes.

By Mr. Steffen:

Q. This exhibit before you. A. About 1926 or 1927. Of course, I couldn't remember exactly.

Q. Did you file an application for a patent based on the product which is Government's Exhibit 641 for Identification? A. Yes, sir.

Q. Do you remember what the date of that application was? A. I don't recollect now.

Q. Could your recollection be refreshed on that? A. Around 1927.

Q. I show you what has been marked as Government's Exhibit No. 642 for Identification.

(The document referred to was marked as Government's Exhibit No. 642 for Identification.)

By Mr. Steffen:

6124 Q. This purports to be a patent issued to you under date of January 27, 1931, No. 1,790,252, and ask you to look at that and see if that refreshes your recollection, Mr. Speer, as to when you filed your application? Look at that first page.

(Government's Exhibit No. 642 for Identification was handed to the witness.)

A. According to this paper—

Justice Stephens: (Interposing) Just answer whether or not that refreshes your recollection. Don't read from the paper. Does it refresh your recollection?

The Witness: Yes, Your Honor.

By Mr. Steffen:

Q. About when would you say you filed your application? What is your best recollection as to when you filed your application for the patent? A. January 12, 1927.

Q. Who was the attorney, if you remember, who represented you in filing the application? A. Mr. Robinson.

Q. And with what firm was he associated, if any? A. He was working for the Beaver Products Corporation.

Q. At that time? A. At that time.

6125 Q. Now, Mr. Speer, after you became a consulting engineer for Certain-teed, did you have any conversations at any time with the officers of Certain-teed? A. Well, I did, yes.

Q. Who did you know among the officers? What officers did you know, if any? A. Mr. George M. Brown; Mr. Whittemore; and Claude Brown.

Q. Did you know Mr. Van Hagan? A. Yes, sir.

Q. Did you know Mr. Straub? A. Yes, sir.

Q. Mr. L. R. Walker? A. Yes, I did.

Q. Now, did you ever have occasion to talk to patent counsel for Certain-teed during this period from April, 1928, when Certain-teed took over the Beaver Products, upthrough the year 1928 and the year 1929? A. Mr. Redfield was the patent counsel, and I did talk to him.

Q. Did you talk to anyone else, any other patent counsel? A. There was no other patent counsel.

Q. Who was Mr. Chaffee? A. He was General Counsel of Certain-teed.

6126 Q. And when you say that Mr. Redfield was patent counsel, what do you mean? A. Well, he was a patent attorney. He had the right to apply for patents in the Patent Office.

Q. And where were his offices, do you remember? A. partly in Mr. Chaffee's office and partly in Certain-teed's office.

Q. And what was the address? A. 100 East 42nd Street.

Q. New York City? A. Yes.

Q. Where was your business address? A. It was in Buffalo, at Certain-teed's office.

Q. And did you see any of the officers of Certain-teed in Buffalo? A. Frequently.

Q. Where was Mr. Van Hagan's office? A. Van Hagan was in the same office building.

Q. And what was his capacity, Mr. Van Hagan's capacity? A. He was Manager of the Plaster Division.

Q. Do you remember when the claims of your application were first allowed? A. About 1928.

Q. What month? A. I wouldn't remember.

6127 Q. Was it in the latter part or the early part—December, or June, or some other month? A. As I recall it, it was early in 1928.

Q. Could your recollection be refreshed on that, Mr. Speer?

Your answer is that it might be? (Laughter).

Justice Stephens: I think that is a highly speculative question which the witness can hardly answer until he sees the alleged refreshing document.

By Mr. Steffen:

Q. I want to show you what has been marked Government's Exhibit 643, which is the file wrapper covering the patent which is Exhibit No. 642, and ask you to look at the page that has been marked, the top of the page and the last line.

(The document referred to was marked as Government's Exhibit No. 643 for Identification.)

(Government's Exhibit No. 643 for Identification was handed to the witness.)

By Mr. Steffen:

Q. I will ask if that refreshes your recollection as to the date when your claims were allowed? A. December 7, 1928.

Q. Now can you remember that? A. Now I re-

6128 member it.

Q. It was in December, 1928? A. Yes.

Q. Well, Mr. Speer, perhaps it will help you if you consider whether you had any meetings at any time—

Justice Stephens: (Interposing) He said, "*Now* I remember it."

Mr. Steffen: Yes.

By Mr. Steffen:

Q. I want to see if it will help you further to consider whether you had any meetings at or about the time that the various claims of your patent were allowed, with Mr. Chaffee or Mr. Whittemore or anyone? A. I did, yes.

Q. Can you tell us the occasion and where you had such a meeting? A. About this patent?

Q. Yes. A. Of course, I had meetings about various patents.

Q. What I want to know is—can you recall any occasion when you had a discussion with officers of Certain-teed, on or about the time that these claims of your patent had been allowed, in New York or elsewhere? A. In both places, New York and Buffalo.

Q. And will you tell us, if you can, what conference, if any, you had in New York? A. I couldn't remember.

6129

Q. Well, what was your practice—were you ever in New York? A. Yes, sir.

Q. And when you went to New York, who would you see, if anyone?

Mr. Bromley: I object to that as speculative and too general.

Mr. Steffen: It is preliminary, Your Honor, to see if I can locate a date—

Justice Jackson: Well, it might run from the date of the man's birth until now.

Justice Stephens: It is too general. Objection sustained.

By Mr. Steffen:

Q. I want to ask you with regard to the year 1928, after the Certain-teed people had taken over the Beaver plants and you were engaged, as you say, as a consulting engineer for Certain-teed—during that period from April, 1928, and on through that year, did you have occasion to go to New York? A. Yes, sir.

Q. And when you went to New York, who did you see in connection with the matter of your duties as a consulting engineer for Certain-teed?

6130

Mr. Bromley: I object to that as too general, and as immaterial. If he has got some conference in mind, why doesn't he ask him about it?

Justice Stephens: Well, that is purely a preliminary question to bring out who he saw. I think that objection should be overruled.

The Witness: Mr. Chaffee and Mr. Whittemore, and Mr. Redfield.

By Mr. Steffen:

Q. Can you say how frequently you went to New York?

Justice Stephens: Now you should fix the time and place, since your preliminary question is over with, so far as you reasonably can.

By Mr. Steffen:

Q. Can you say how frequently you were in New York and saw Mr. Chaffee or Mr. Whittemore or both of them? A. At least once a month, on the average.

Q. And those conferences were with regard to your duties as a consulting engineer? A. Yes.

Mr. Bromley: I object to that as leading.

Justice Stephens: The witness should not be led.

Mr. Steffen: Yes, Your Honor.

By Mr. Steffen:

6131 Q. Then when you saw Mr. Chaffee, can you tell us what you talked with him about?

Mr. Adams: I respectfully object to that question on the ground that that involves a communication between attorney and client, and is consequently privileged.

Mr. Steffen: I would make the point, Your Honor, that this is preliminary, and that it would usually result also in a conference with Mr. Whittemore, and that the matter of privilege, I should think, would stand on the same ground that this whole question of privilege stands upon, —that is, we are leading to the Redfield memorandum, which is Exhibit 233, and these are the preliminary conferences. If the Redfield memorandum is not within the attorney-client privilege, the conversations preliminary to and giving effect to, and out of which the Redfield memorandum grew, it seems to me, would be equally outside of the attorney-client privilege. That is the basis of that line of questioning.

Justice Stephens: You are attempting to establish here, I assume, that the Redfield document was the act, by adoption or acquiescence or action of some sort, of Certain-teed?

Mr. Steffen: Yes, Your Honor, and make the connection which Your Honor has pointed out needed to be made in order to show that this was in some sense a declaration of

a member of Certain-teed, either that they acted
6132 upon the declaration or that it is declarative of the purpose and intent and understanding of the members of Certain-teed.

Mr. Adams: It is perfectly clear, Your Honor—

Justice Stephens: (Interposing) Well, it seems to me, Mr. Adams, that your objection is a little premature. We don't know yet what the nature of the conversation was. Not every conversation between a lawyer and his client is privileged. It depends upon the content of the conversation.

On the other hand, Mr. Steffen, I should think you can't lift yourself by your bootstraps. The mere fact that there is a question as to whether or not Exhibit 233 escapes the privilege, and that you have to build a foundation to get it out of the privilege, doesn't, I think, lower the bars of the rules of evidence with respect to conversations which you may wish to go into on that topic. If they are privileged, they are privileged.

We will have to hear the answer to that question before we can know whether these particular conversations you are going into now are privileged.

Mr. Steffen: All right.

Justice Stephens: You may reserve a right to move to strike, Mr. Adams, if it turns out that the conversations which are now being related were privileged.

Mr. Steffen: Perhaps I had better restate the matter, Your Honor.

6133 By Mr. Steffen:

Q. I want to refer now, Mr. Speer, to any meetings which you may have had with Mr. Chaffee or Mr. Whittemore, or both, after the time when your claims were allowed, in December, 1928, and can you recall any occasion when you were in New York and had such a conference concerning your closed-edge board patent? A. Yes, I spoke to Mr. Chaffee and also to Mr. Whittemore.

Q. And did you ever have a conference where both of them were present? A. My recollection is that I did have.

Q. And was there anyone else present at that conference? A. Well, occasionally some of the other officers, officials, came in, probably for a few minutes.

Q. And who would you mention? A. Walker—

Q. (Interposing) Mr. L. R. Walker? A. Yes, he was the General Sales Manager.

Q. And can you say what was said at this conference by yourself?

Mr. Adams: I object, Your Honor, on the ground that this witness has not testified yet about any conference, and particularly has not identified the persons who were present. He says occasionally other people came in
6134 to these conferences.

Justice Stephens: Let me ask the witness a question.

Are you talking now about some particular conference that you had in mind, at which Mr. Chaffee and Mr. Whittemore were present; or are you simply stating that there were, from time to time, conferences at which those two men were present and that on those occasions sometimes others dropped in?

The Witness: Yes, Your Honor.

Justice Stephens: The latter?

The Witness: Yes, Your Honor.

Justice Stephens: I had some doubt, myself, as to whether the witness was talking about any particular conference.

Objection sustained, but you may proceed further, Mr. Steffen.

By Mr. Steffen:

Q. What we want to know, Mr. Speer, is whether you can remember a particular conference at which both Mr. Whittemore and Mr. Chaffee were present, at which you discussed the matter of your patent, the claims of which had been allowed in December, 1928. Now do you have a recollection of a meeting? That is what I am asking you. A. I don't have a definite recollection, because it wasn't the only subject we discussed.

6135 Q. But do you have a recollection of a meeting at which this subject was discussed? A. I don't think so.

Q. Did you ever, at any time, discuss with Mr. Whittemore the possibility that the company should make a board according to your patent? A. Yes—

Mr. Bromley: (Interposing) Just a moment. I object to that as leading and suggestive, and also on the ground it has already been answered; and move to strike the answer.

Justice Stephens: Read it, please.

(The question was read by the reporter.)

Justice Stephens: It is leading, and therefore the objection is sustained; and it has been answered in the negative.

Mr. Steffen: The negative answers heretofore were that

he could not remember particular conferences. I asked him whether he had a conference at any time at which it was suggested that the matter of making the board under his patent had been considered.

Justice Stephens: Perhaps I misunderstood your objection. I thought it had been answered in the negative.

Mr. Bromley: I thought it had. I thought he had theretofore said he couldn't remember any conferences.

I move to strike this answer "Yes" on the ground
6136 that the question was a leading question, and therefore improper.

Justice Stephens: I think it is not proper to lead here, Mr. Steffen. We want to be reasonably lenient, within our discretion, on preliminary questions, but whether a conference was had on this particular topic is apparently critical. You ought to ask the witness what conversations he had, and when, and what was discussed in them, and not suggest what was discussed in them.

Objection sustained and the motion to strike is granted.

By Mr. Steffen:

Q. Now, Mr. Speer, we want to know any conversation that you had with Mr. Whittemore or Mr. Chaffee concerning the matter of making a board—

Mr. Bromley: (Interposing) I object to that as repetitious on the ground that it has already been answered.

Mr. Steffen: He said he did have a conversation. I don't know how I can direct him to the subject matter better than by asking him whether he ever had a conversation regarding the making of the board according to his patent.

Mr. Bromley: The witness has told counsel that he had no recollection of what transpired at any conversation that he may have had.

Justice Stephens: No, I think he didn't state that, Mr. Bromley. What he stated was that he didn't have a
6137 recollection of a particular conference. The witness does testify that he had conferences from time to time with Whittemore and Chaffee, ar[illegible] that from time to time other persons would drop in. He apparently couldn't recollect any particular conference.

The objection is overruled to that last question.

Mr. Steffen: Let's have an answer to the previous question. Will you read it, Mr. Reporter?

(The question was read by the reporter.)

Justice Jackson: That is no question, is it? You are not asking him anything.

By Mr. Steffen:

Q. My question is: Will you tell the Court what was said if anything, at any conference that you had with Mr. Whittemore or Mr. Chaffee, concerning the possibility that the company might make a board according to your patent?

Mr. Adams: I object to that on the ground that it is suggestive, in the first place, and leading; and in the second place, that the time and place of the conference should be fixed, and I think it is particularly important here, because the witness has already said that he couldn't remember any particular conference, or what transpired at any particular conference.

Justice Stephens: Is that true, Mr. Speer? Do you or do you not remember any particular conference that you
6138 had with these gentlemen that you have mentioned?

The Witness: I don't, I don't remember. It is not clear to me.

Justice Jackson: But you do remember that you did have conferences with them about this subject matter?

The Witness: Yes.

Justice Jackson: But you can't fix any specific rate or any specific conference?

The Witness: Yes.

Justice Jackson: But you had conferences with them concerning it?

The Witness: Yes.

Justice Stephens: Can you tell where those conferences took place?

The Witness: Mostly in New York.

Justice Stephens: In whose offices?

The Witness: In Mr. Whittemore's office or Mr. Chaffee's office.

Justice Stephens: Can you say within what period they took place? If you can't remember a particular date, can you say approximately within what period they took place?

The Witness: Within a year.

Justice Stephens: What year?

The Witness: 1928.

Justice Stephens: Well, we haven't ruled hereto-
6139 fore in this case that conferences should be limited to a particular day. If they can be fixed with reasonable certainty so that the defendants can have a chance to prepare themselves to cross-examine them, that is sufficient.

I should think those last answers are sufficient, if he now remembers what was said. If there are objections to that, they may be shown in the record on behalf of the defendants, and overruled.

By Mr. Steffen:

Q. Will you tell us what was said at these conferences between you and Mr. Chaffee and Mr. Whittemore, about the matter of making a board? If you can't remember the exact words, can you give us the substance?

Mr. Adams: Was this in the year 1928?

By Mr. Steffen:

Q. This was in 1928, and did you have conferences in the early part of 1929? A. Yes, sir.

Q. During the latter part of 1928 and the early part of 1929, then, tell us what was said, if you can, or the substance of what was said, concerning the matter of making a closed-edge board? A. Well, I just simply wanted Certain-teed to start manufacturing this particular board.

Q. You did? A. Yes.

6140 Q. And what did you say along that line? A. That is about all I said. I tried to get them to use it.

Q. You tried to get them to use it? A. Yes.

Q. Why did you think they should use it?

Mr. Adams: I object to that, if you please.

Jutice Stephens: Yes, why he thought they should use it is immaterial, I should think. Objection sustained.

By Mr. Steffen:

Q. State, if you can, what reasons you may have advanced for them using your board?

Mr. Adams: I object—

Justice Stephens: (Interposing) It is exactly the same question you asked before, except a little more explicitly stated. You asked him what his reasons were—just a minute, there is a division on the bench. Judge Jackson disagrees with me. If my colleagues differ with me, I am very happy to consult them.

What do you say about it, Judge Garrett?

(The Justices conferred.)

Justice Stephens: How do you claim his reasons as to why they should make the board are material?

Mr. Steffen: I want to get the conversation to

6141 show the discussion that took place, if it did—

Justice Stephens: (Interposing) You didn't ask for that, you asked him what his reasons in his own mind were, as I understood, as to why they should use the board.

Mr. Steffen: What reasons did he urge upon the company, if any.

Justice Stephens: He may state the conversation, and if the conversation included reasons, he may state those. I thought you were inquiring as to what his inner reasons were as to why they should use it.

Mr. Steffen: No.

By Mr. Steffen:

Q. Did you advance any reasons to Mr. Whittemore and Mr. Chaffee why it might be desirable for the company to make a board according to your invention? A. Yes, sir.

Q. And what were they? A. In the first place, I consider the board superior—

Mr. Bromley: (Interposing) I move to strike that out.

By Mr. Steffen:

Q. What did you say to them?

Mr. Bromley: May that answer be stricken?

Justice Stephens: It may go out, although I think plainly the witness means that that is what he told them.

Mr. Speer, don't give us your own thoughts, either
6142 then or now, as to why the board should be used.

Tell us what you said to them. You don't have to tell the exact words. Of course, we don't expect you to be superhuman in your memory. But if you can remember the substance of what you said to them, tell us that.

The Witness: Well, my main reason was—

Justice Jackson: (Interposing) Is this what you told them?

The Witness: Yes, that is what I told them, that my reason was that the board was superior to anything they had at that time.

By Mr. Steffen:

Q. Why was it superior, did you say, if you did?

Mr. Adams: I object again to this. It seems to me that this is much too suggestive and leading. The witness obviously has a very vague recollection on this.

Justice Stephens: I don't think that last question is improper. If the witness told them why it was superior, that is a part of the conversation. The objection is overruled.

You may proceed on that question, Mr. Steffen.

By Mr. Steffen:

Q. If you told them that it was superior, in what particu-

lars did you say that it was superior? A. The edge was reinforced, that is what I told them.

Q. Can you show, by your sample there, what you
6143 mean by the edge being reinforced? A. Yes, sir.

Q. Will you do that for the Court, please?

Justice Stephens: That exhibit is not in the record yet, Mr. Steffen.

Mr. Steffen: All right.

By Mr. Steffen:

Q. Simply describe, Mr. Speer, what you told them? A. Well, this board—

Justice Stephens: (Interposing) Don't describe it from that exhibit, because, unhappily, it isn't in the record, and therefore the description, if you refer to the board, won't be in the record, won't be proper. Just lay it aside and tell us what you told them as to its superior qualities.

The Witness: I told them it had a double reinforced edge; and that it would withstand nailing better than anything they had at that time. That is what I told them.

By Mr. Steffen:

Q. And did Mr. Chaffee—

Justice Stephens: (Interposing) If you feel it is necessary to your presentation of this witness, you may offer this exhibit as illustrative of his testimony.

Mr. Steffen: I should like to do that, Your Honor.

Justice Stephens: Any objection?

6144 Mr. Bromley: I object to it as immaterial, only.

Justice Stephens: It will be received as illustrative of his testimony.

(The article marked as Government's Exhibit No. 641, was received in evidence for the limited purpose stated.)

Justice Stephens: Now you may describe, if you wish, what you told them in terms of that exhibit. Did you have it there with you?

The Witness: Yes, sir.

Justice Stephens: Very well.

By Mr. Steffen:

Q. And what did you tell them about it, Mr. Speer, if you can tell us any more, using the board that you have before you?

Mr. Bromley: Could we see the board, the exhibit, please?

Mr. Steffen: Surely.

(Government's Exhibit No. 641 handed to defendants' counsel.)

Justice Stephens: We will take the morning recess at this time.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

6145 Justice Stephens: Proceed.

Mr. Steffen: Will you return Exhibit 641 to the witness, Mr. Marshal?

(Exhibit 641 was again handed to the witness.)

By Mr. Steffen:

Q. Just before the recess we were talking about this meeting at which you were advancing reasons to Mr. Whittemore why they should produce your board. Can you state any additional reasons that you may have mentioned to Mr. Whittemore? A. Yes, I can.

Q. Would you state them, please? A. Well, they had trouble about the open-edge, and wanted to get away from it, and I told Mr. Whittemore that this would be a good board to take the place of the open-edge board.

Q. Do you know whether Certain-teed was making an open-edge board at this time? A. I couldn't remember distinctly. I know they were making open-edge board, but I don't know whether it was at the same time.

Q. I notice that the exhibit, Government's Exhibit No. 641, has a colored insert in there—could you tell us what that is?

Did you mention that to Mr. Whittemore? A. I

6146 did, it had an advertising value, a sales value.

Q. What would be the advertising value if they used that? A. It was something entirely different from any board on the market.

Q. Now, I notice that the edge is rounded on Exhibit 641. Can you explain that, or did you mention that to Mr. Whittemore or to Mr. Chaffee? A. No, I wouldn't say anything about the shape of the edge, because I told Mr. Whittemore that they could make any shape. In fact, I did have samples when I spoke to them.

Q. What did Mr. Whittemore say?

Mr. Adams: This is also subject to my objection as to privilege, I suppose. I take it that Mr. Chaffee was present.

Justice Stephens: Yes. The Judges can't tell whether a document or a conversation is privileged without looking at it or hearing it. We will have to hear the testimony first, but you may move to strike it if it turns out to be privileged.

By Mr. Steffen:

Q. What, if anything, did Mr. Whittemore say in response to your statements? A. Well, he didn't say very much.

Q. Well, how would you describe what he said? What did he say? A. He didn't say very much, I repeat it again.

6147 Justice Jackson: Did he say anything?

The Witness: Well, he said that he had to look into it.

Mr. Steffen: Now this may be privileged, your Honor, and within Mr. Adams' objection.

By Mr. Steffen:

Q. What, if anything, did Mr. Chaffee say to Mr. Whittemore while you were there, concerning whether the company should make or should not make closed-edge board of the sort you had? A. Mr. Chaffee favored it. He told Mr. Whittemore and myself—I was present when he told Mr. Whittemore—that he would like to see this board go over.

Q. And did he give any reasons? A. He did give reasons.

Q. And what reasons did he give? A. One of the reasons was that Certain-teed could license this particular board and collect royalties on it.

Q. Now do you recall any other conversation at this time concerning the board? Did Mr. Walker or anybody else who may have been present—

Mr. Adams: (Interposing) May I interrupt here? Mr. Steffen is proceeding into a new series of conversations, your Honor, I believe.

Mr. Steffen: I intended to stay with this one conversation.

6148 Justice Stephens: He hasn't yet identified one conversation. The witness has been frankly describing the contents of conversations or conferences that were held in 1928 and early 1929, without fixing a particular date. He says that at those conferences, other persons dropped in from time to time.

What is your objection, Mr. Adams?

Mr. Adams: I think I am premature, then.

By Mr. Steffen:

Q. Do you recall any conference during this period, the latter part of 1928 and the first half of 1929, when Mr. Walker was present, and can you tell us anything that he may have said, if he was present? A. Well, I couldn't remember.

Q. I see. Well, now, you have told us that you made the test, and made the sample which is before you, which is Government's Exhibit 641 in evidence, while you were still a consulting engineer for Beaver Products. Do you recall at any time having made a sample board while you were connected with Certain-teed? A. Yes sir.

Q. And can you give us approximately when that test was made? A. I should say around 1929.

Q. And did you sail for Europe during the summer
6149 of 1929? A. Yes sir.

Q. And does that help you place in any way the time when you made a test for Certain-teed? A. I don't know, I don't think I would remember distinctly, so many things happened then.

Q. What I wanted to get at simply was--was your test or your sample board made for Certain-teed before you sailed for Europe or after, can you tell? A. Before and after.

Q. I see. When did you sail for Europe? A. It was, as I recall it, in July, and I stayed there until September 15, about.

Q. Will you describe to us what sort of a pilot test you made for Certain-teed at this time?

Mr. Bromley: I object to that as immaterial.

Justice Stephens: What do you claim for this by way of laying a foundation for Exhibit 233? It may be preliminary, I don't know.

Mr. Steffen: It is partly preliminary, and partly, I think I should tell your Honors, for a second purpose which I have in connection with Mr. Speer's testimony.

I wish to introduce this evidence to indicate that the Certain-teed people were actually making tests on a closed-edge board at the time, that is in 1929, and I do that for the reason that I think one of the important issues in
6150 this case, as certainly Mr. Bromley will claim, is that there is a question as to whether the Utzman closed-edge board was the only closed-edge board that could be made. Here we have, I think, the Certain-teed people ex-

perimenting with a board in the period around May, 1929, and it is very relevant, it seems to me, to show what that test was and whether that test was successful, for the purpose of showing that it was not essential for Certain-teed to take out a license under the closed-edge board patent in order to get a closed edge, they had one right in their own works; they held the patent and the claims had already been allowed, as the file wrapper will show, in December, 1928. And I want to introduce that.

But it is also preliminary to the Redfield matter, for the reason that there were conferences with Mr. Redfield at this same time, out of which grew the discussion which resulted in Exhibit No. 233.

Justice Stephens: Do you wish to be heard further, Mr. Bromley?

Mr. Bromley: I don't understand the materiality of it. This patent was not issued until 1931.

Mr. Steffen: As respects that, the claims were allowed in December, 1928, and as Mr. Redfield states in his memorandum, and as your Honors will understand, when they were allowed the patent could issue in a very short time thereafter.

Mr. Adams: I object to the statement concerning
6151 what appears in the Redfield memorandum.

Mr. Steffen: I make it on the broad proposition that when the claims are allowed, as does appear in the file wrapper which I will offer in evidence, you have, then, positive evidence that they did have nine claims covering a closed-edge board, the very closed-edge board which is Government's Exhibit No. 641; and that those claims could have been issued, as your Honors know, in a patent, very shortly after, in a matter of a few weeks.

I want to show also that they were making experiments on that board, making tests of it, in their plant at Buffalo, and that Mr. Speer conducted them, and that they were successful.

Justice Garrett: The matter didn't get in interference, I suppose, after the claims had been passed?

Mr. Steffen: No, your Honor, because the file wrapper shows that the patent was issued in 1931.

Justice Garrett: There was a period of more than a year after the claims had been marked "Allowed," before they actually took out the patent?

Mr. Steffen: That is right.

Mr. Bromley: Approximately three years.

Mr. Steffen: December, 1928, to January, 1931, when the patent was issued.

(Discussion off the record.)

Mr. Steffen: We will introduce the patents, and
6152 your Honors can tell from that just how broad or how narrow the claims were. Our contention is that the claims were sufficiently broad to allow them to manufacture this board, regardless of the Utzman Patent.

Justice Jackson: They could manufacture this board, but not the Utzman board?

Mr. Steffen: That is right.

Justice Stephens: So far as Mr. Adams' objection to the reference to the contents of Exhibit 233 is concerned, that objection is well taken, and we will not consider the comment of counsel for the Government, made in respect of that, as part of the record.

But as far as this question of materiality is concerned, we suppose you are offering this under the theory of subterfuge, are you not?

Mr. Steffen: That is right, your Honor.

Justice Stephens: You are attempting to show that the defendants knew, or might reasonably have known, that they could have manufactured a closed-edge board without paying royalties and having licenses, is that right?

Mr. Steffen: That is right, your Honor.

Justice Stephens: Well, we think it is material on that issue, and the objection is overruled. The objection apparently goes to its weight rather than to its materiality or relevancy.

Mr. Stephen: May we have the last question,
6153 please, Mr. Grover?

Justice Stephens: Before you read that, Mr. Grover, I would like to make this suggestion to you, Mr. Steffen.

Insofar as you can—it may be, to use a mixed figure of speech, that you can't unscramble the testimony—but insofar as you can, if you could separate the testimony which has to do with the asserted foundation for Exhibit 233, from the testimony that goes to the subterfuge theory, it will make the record clearer, because we ought to have all the testimony together on the subject of Exhibit 233. But if you can't accomplish that, if they are all related and interrelated, we can't expect you to do the impossible.

Justice Jackson: You are really on the subterfuge issue now, are you not?

Mr. Steffen: This immediate testimony will have to do with that, and then it leads into the conversation, which I think we can show, with Mr. Redfield.

Will you read the pending question, Mr. Reporter?

(The reporter read the question as follows:

"Q. Will you describe to us what sort of a pilot test you made for Certain-teed at this time?")

By Mr. Steffen:

Q. Will you please do that, Mr. Speer, describe the test you made? A. We built a miniature machine, a pilot machine.

6154 Q. Where did you build that? A. In Buffalo, at the Certain-teed plant.

Q. And will you describe the machine more fully? A. Well, it was practically the same as a large machine, except on a smaller scale.

Q. And did you run off some samples of board on that machine? A. I did.

Q. Do you recall ever having taken those samples anywhere? A. Yes.

Q. To whom did you show them? A. I showed them to Mr. Chaffee, to Mr. Whittemore, and to Mr. Van Hagan.

Q. And can you tell us what any one of them told you about the samples? A. Well, the only one who liked them was Mr. Chaffee.

Q. Can you say anything that Mr. Whittemore told you about them? A. Well, he liked the samples, but he didn't commit himself whether we should go ahead or not.

Q. Did you have any talk with Mr. Van Hagan, who you say was in the same building with you? A. Well, he saw the machine and he saw the process.

Q. And did he express an opinion concerning whether it was a good or a bad product? A. He didn't,

6155 as I recall it.

Q. He did or did not? A. He did not.

Q. Now, that machine that you built,—could you give us an estimate of how much it cost? A. There was quite considerable labor involved.

Q. How long did it take to make it? A. I couldn't answer that.

Q. Could you say roughly how long, one month or ten months? A. No, I don't think ten months, less than that.

Q. And what authority did you have to get, if any, to

make it? A. Well, they had to approve the appropriation for it.

Q. And when you say "they", who do you mean? A. Well, I really don't know who approved that, but Mr. Whittemore was supposed to approve any appropriations. He was the final authority in approving them.

Q. When did you first meet Mr. Redfield, or do you remember having met Mr. Redfield? A. I remember meeting him, but I don't remember the time.

Q. It appears that you had nine claims in your patent allowed in December, 1928. Was there ever, at any time, an amendment to your claims, were there ever any
6156 further claims? A. Yes.

Q. And do you recall about when that was? A. I am not positive about the time.

Q. Will you refer to Government's Exhibit No. 643 for identification, and see if that will refresh your recollection? A. I can read it so I remember it.

Q. Well, can you tell us now about what it was?

Justice Stephens: Is there any dispute about it? Couldn't we stipulate on that and save this time?

Mr. Steffen: It was June 5, 1929.

Justice Stephens: Show the file wrapper to counsel for the defendants.

The Witness: June 12, 1929.

(Exhibit 643 for identification was handed to defendants' counsel.)

Mr. Bromley: I will stipulate that the applicant Speer made an amendment to his claims on June 5, 1929.

Justice Stephens: Thank you. That will save proving this.

Mr. Bromley: His answer, June 12, was incorrect.

Justice Jackson: What is that?

Mr. Bromley: The witness answered, June 12, 1929. That is the date on which he revoked a power of attorney.

The Witness: That is the date I read, the date of the power of attorney.

6157 Mr. Bromley: We weren't interested in that; we wanted to get the date when you filed your amendment.

The Witness: I will have to look at that.

Mr. Bromley: That was June 5, 1929.

By Mr. Steffen:

Q. Mr. Robinson had formerly been your counsel, had he not, Mr. Speer? A. Yes sir.

Q. And do you remember when Mr. Redfield became counsel? A. Yes sir.

Q. About when was that, at about this same time? A. Well, he became attorney for the Certain-teed when Certain-teed took over the Beaver Products Corporation. He was already employed by them at the time they purchased the Beaver Products Corporation.

Q. Now you say he was employed by Certain-teed—what do you base that upon?

Justice Jackson: Who is this, Mr. Redfield?

Mr. Steffen: Yes.

Mr. Bromley: I object to that as calling for a conclusion.

Mr. Steffen: I know it, and that is why I want to correct it, if it is not based on actual information. I think his answer is a conclusion.

Mr. Bromley: Then I move to strike his answer.

Justice Stephens: It may go out.

6158 By Mr. Steffen:

Q. Do you know whether Mr. Redfield was hired by Certain-teed? A. I do not.

Q. Do you know where his offices were? A. Yes sir.

Q. And where were they—

Justice Stephens: (Interposing) Is it necessary to take time on this? Isn't it already on the record that he was a member of the Chaffee organization, which was counsel for Certain-teed?

Mr. Steffen: I believe that is correct, your Honor.

By Mr. Steffen:

Q. Now, do you recall having a conversation with Mr. Redfield on or about this time in June, 1929, concerning the matter of your patent and the possibility of making a product under your patent? A. Yes sir.

Q. Can you tell us about where that conversation was held? A. I can't remember the exact time.

Justice Jackson: He asked you where, the place.

The Witness: It was either in Buffalo or New York, or Chicago. We had correspondence just then, various correspondence, and I met him in Chicago, and also I

6159 met him in New York and Buffalo.

By Mr. Steffen:

Q. Did you have more than one conference with Mr. Redfield at about this time in June, 1929? A. Yes sir.

Q. Did you also have a conference, or any conferences, with Mr. Chaffee, during this time? A. I did.

Q. And do you recall ever having discussed, either with Mr. Redfield or Mr. Chaffee, the USG or Avery license agreement?

Mr. Adams: At this point I object with regard to these conversations, on the ground that they are privileged. These, I believe, are new and different conversations than the previous ones referred to.

Justice Stephens: You want to make your record. Yes, your objection may be recorded and is overruled, subject to a motion to strike, if the conversations turn out to be privileged.

By Mr. Steffen:

Q. Do you recall ever having conversations, either with Mr. Redfield or with Mr. Chaffee, at about this time, concerning the USG license agreement? A. I had conversations with Mr. Chaffee, but not with Mr. Redfield.

6160 Q. At that time? A. Yes.

Q. And did you ever see the license agreement? A. I did.

Q. And did you ever have a copy of it? A. I did.

Q. I now would like to have you tell me what your conversation with Mr. Redfield was concerning the matter of making a closed-edge board according to your patent? A. Well, I don't remember it exactly.

Q. We want simply the substance of your conversation. A. Well, I told Mr. Redfield about this particular edge, how they could utilize it for Certain-teed, meaning how they could use it, and how they could collect royalties.

Q. And what did he say to you, or what discussion did he have with you? A. That is about all I remember.

Q. Did you discuss the general situation in the industry with Mr. Redfield?

Mr. Bromley: I object to that as leading and suggestive.

Justice Stephens: Yes, this is supposed to be a critical matter with respect to the admissibility of Exhibit 233. You shouldn't lead. Objection sustained.

By Mr. Steffen:

Q. State what you did discuss, if anything, in addition to the matter you have just mentioned?

6161 Mr. Bromley: He has already said he didn't remember anything more.

Mr. Steffen: This goes to Mr. Speer's conversation with Mr. Redfield.

Justice Stephens: Have you stated everything that you talked to Mr. Redfield about, so far as you remember, in substance and effect?

The Witness: Well, I don't think I remember anything more just at this minute.

By Mr. Steffen:

Q. Did you have any further discussion with Mr. Chaffee about the matter of the license agreements? A. I did.

Q. What did he say? A. Well, he was very downhearted about it.

Mr. Adams: I move to strike that, your Honor, that Mr. Chaffee was "downhearted", although I think probably he should have been. (Laughter)

Justice Stephens: Well, technically it is a conclusion. It may go out. Tell us what Mr. Chaffee said, in substance and effect.

The Witness: Well M.. Chaffee said that Certain-teed signed that agreement against his advice. I remember that distinctly.

By Mr Steffen:

6162 Q. And did you talk with Mr. Redfield concerning that? A. I don't think I did, I don't remember ever discussing it with him. He was a patent lawyer, and that is all. (Laughter)

Justice Stephens: Mr. Olson,, that is pretty hard on you. (Laughter)

By Mr. Steffen:

Q. I want to show you Government's Exhibit 233, Mr. Speer, and ask if that refreshes your recollection on any conversation you may have had with Mr. Redfield?

(The document referred to was handed to the witness.)

A. I would like to take my time just to read it over, because it happened many years ago.

Justice Stephens: Take your time and read it.

By Mr. Steffen:

Q. Have you examined Exhibit No. 233, Mr. Redfield's memorandum, Mr. Speer? A. Yes sir.

Q. And does that recall to your mind anything that you discussed with Mr. Redfield? A. Well, I would say that substantially—

Mr. Adams: (Interposing) Just a minute, please. May the witness be instructed here—

Justice Stephens: (Interposing) That may go
6163 out. Just lay aside that document for a moment.

All you are being asked now is whether or not the reading of that document refreshes your present recollection as to anything you told Mr. Redfield, or that he discussed with you. Just answer that yes or not. Does it or does it not?

The Witness: Yes, your Honor, it does.

Justice Stephens: It does?

The Witness: Yes.

By Mr. Steffen:

Q. Tell us what it brings back to your mind.

Mr. Adams: I suggest that the witness be given a full opportunity, of course, to read the document, but I don't think that he should now be permitted in effect to read from it.

Justice Stephens: All you are being asked now, Mr. Speer, since you say your present recollection has been refreshed as to what you told Mr. Redfield, is to tell us what you did tell him in addition to what you have already told us.

(At this point the witness laid Exhibit 233 face down.)

The Witness: I told Mr. Redfield that this plasterboard, this patent itself, would be a very good trade with United States Gypsum Company in their new agreement. That is one thing. The other was that it had a distinctive fea-
ture. Also, we looked up the patents, and we saw
6164 that the Utzman Patent was about to expire, the next year, and they should have something, some patent, which would be still in force. That is about all.

By Mr. Steffen:

Q. Do you recall any further discussion with Mr. Redfield about this matter? A. No sir.

Q. Or any other discussions with Mr. Chaffee, about the same matter? A. I think I discussed it exactly the way I just stated. Whether Mr. Chaffee was present or not, I discussed the same thing.

Justice Stephens: I don't quite understand you. Do you mean that you don't know whether Mr. Chaffee was present or not?

The Witness: I don't think, as far as I remember, that Mr. Chaffee was present.

Justice Stephens: Very well.

By Mr. Steffen:

Q. Now, you have told us that you went to Europe in the summer of 1929, and got back in September? A. Yes sir.

Q. Do you remember any conversations thereafter with Mr. Redfield or with officers of the corporation, concerning the desirability of using your patent?

6165 Mr. Adams: Since this appears to be concerning a new group of conversations, I would like to interpose my usual objection.

Justice Stephens: Your objection may be recorded, and it is overruled. You may reserve the right to move to strike in the event it appears to be privileged.

By Mr. Steffen:

Q. Do you remember any conversations with officers of the company after September, 1929, when you returned from Europe, concerning the desirability of using your patent in making board? A. I do.

Q. About when? A. I can't fix the time just now.

Q. Will you tell us as nearly as you can? A. I would be guessing, and I don't want to guess.

Q. That is all right. Was it within the next year? A. I should say within a year or a year and a half.

Q. Can you tell us whether the company ever has made a product according to your patent? A. No sir.

Q. You mean that they haven't made it, is that it? A. They haven't made it.

Mr. Steffen: I now offer in evidence, your Honor, Government's Exhibits 642 and 643. Exhibit 642

6166 is the Speer Patent, which was issued on January 27, 1931, and concerning which Mr. Speer has testified—

Justice Stephens: (Interposing) You are offering that on the subterfuge theory, I assume?

Mr. Steffen: We are offering that, and Exhibit 643, which is the file wrapper, on the subterfuge theory.

Mr. Bromley: I object to them as immaterial.

Justice Stephens: The objection is overruled; they are received in evidence.

(Government's Exhibits Nos. 642 and 643 for identification were received in evidence.)

Mr. Steffen: I believe that Exhibit 641 was introduced in evidence—

Justice Stephens: Merely as illustrative of the witness's testimony, and it was received for that purpose.

Mr. Steffen: I would like now to offer it broadly as a sample of the board which could be made in accordance with the Speer Patent.

Justice Stephens: Is there any objection?

Mr. Bromley: Not other than that it is immaterial.

Justice Stephens: The objection is overruled; it is received in evidence.

(Government's Exhibit No. 641 for identification was received in evidence.)

6167 Mr. Steffen: We now reoffer Government's Exhibit No. 233, your Honor, and I want to make a short statement on that.

Justice Jackson: Just one minute. Have you assigned your patent to Certain-teed, Mr. Speer, the one you have been testifying about?

The Witness: Yes, your Honor.

Justice Jackson: When was the assignment made, do you know?

The Witness: Before the patent application.

Justice Jackson: I see.

Mr. Adams: I don't want to interrupt Mr. Steffen's statement, but I have some motions to strike, which I would like to make, and it would seem to me that it would be appropriate to make them now.

Justice Stephens: That is right. We ought to know what is before us before we hear the argument on whether or not Exhibit 233 has been qualified.

Are you moving to strike out Mr. Speer's testimony of his conversations with Chaffee and Redfield, as privileged?

Mr. Adams: That is right, your Honor.

I call particular attention to the fact that the first group of conversations included testimony with respect to Chaffee's views as to licensing under this patent—clearly a legal matter.

Secondly, this witness testified that with respect
6168 to the later conversations, Chaffee told him that when Certain-teed entered into this license agreement, that it was contrary to Chaffee's advice—again purely a legal matter, and he was obviously expressing a legal opinion on a legal subject, one in which Chaffee apparently was interested, and upon which he must have been consulted in his professional capacity.

The later discussions were with Mr. Redfield, and had

to do with the use of the patent, and the matter of collecting royalties under it. They had looked up the patents and discussed the various matters with relation to the patents, and their legal status. It seems to me to be clear that all of those matters would fall within the attorney-client privilege, and therefore should not be allowed in evidence.

Justice Stephens: Do you think the conversations appear to have been for the purpose of eliciting legal advice, and that they were conversations between a client and his lawyer?

Mr. Adams: Clearly. You see Mr. Speer was acting here as a consulting engineer for the company. He was called into conference with counsel for the company, and executives, for the purpose of discussing the use by the company of a product. Obviously, Mr. Chaffee wasn't there as a businessman. Obviously, he was concerned, as the witness has testified, about the license agreements, and the position of Certain-teed with respect to the license agreements.

I do not think, however, your Honor, that I am
6169 compelled to take the position that he must have been present for the purpose of eliciting legal advice. I think that is what you said. I think it is sufficient that the purpose of the conference or the meeting or the communication, rather, was to—

Justice Stephens: (Interposing) Mr. Wigmore states that the privilege covers all matters discussed by the client with a view to advice—and no others. Mr. Hughes, in his work on evidence, says in effect, the same thing, that the purpose of the communication must be to elicit legal advice—otherwise there is no privilege.

It seems to me that in part these conversations were merely an attempt on the part of Mr. Speer, naturally enough, an inventor of this Speer edge, to demonstrate to his employer its advantages. Is there anything privileged about that?

Mr. Adams: I think that, standing alone and not taken in relation to the whole of the circumstances in this case, it would probably not be privileged. I think that we can ask the Court reasonably to look at all the circumstances which would attend upon this situation.

It seems to me that in the light of all those circumstances, where you have the company having had an experience with this open-edge board, we know from the

record that they had been and were considering the question of securing the Utzman board, which they deemed to be better; we know that they consulted their
counsel about it; we know that their counsel was
6170 concerned about the question of the license agreements; and now we have this witness who comes along and discusses, as a consulting engineer, another product which would obviously relate to a very vital legal matter.

I therefore say, it seems to me at least, that we could reasonably regard this as part of the whole situation as it existed at that time, and that we cannot therefore fairly separate it from the context of all that had gone before, and what went after.

Justice Stephens: Mr. Steffen, do you wish to be heard on this aspect of whether or not these conversations were privileged?

Mr. Steffen: I might say just a word or two.

It seems to me that in regard to the first conversation, at which Mr. Chaffee was present, and talked, concerning whether they should or should not manufacture board according to the Speer Patent, and he urged in effect that they should, I don't see any legal advice or professional capacity there at all. That was straight business. Therefore I would think that under no rule whatever would they come within the attorney-client privilege.

Then in the May conversations, Chaffee makes the statement, according to this witness, that he was opposed to the company's having gone into the May, 1929, agreement. That, again, I don't think is anything more
6171 than a statement of his general position on the matter. Certainly, it was a past event at that time, the contract had been signed in May, and he had opposed it, or he was now saying that he had opposed it.

Then coming down to the discussions last testified to by Mr. Speer, at which Mr. Redfield or Mr. Chaffee, or both, discussed the desirability of finding some patent upon which they could operate, as related in Government's Exhibit No. 233 for identification, we say again that that, to the Government's mind, doesn't constitute a case coming within the attorney-client privilege.

It seems that it gets closer to the line—we are frank to grant that.

It seems to us that this is matter largely, again, of finding a business device, or bartering device, that they could use in their dealings with USG. It doesn't involve any

great amount, so far as the conversation was related to the Court, of professional advice, as I see it. It seems to me more a business device of getting something to barter or trade with, and that clearly would not be a matter within the attorney-client privilege.

There was nothing confined by the client to the attorneys concerning that. They were actually functioning as, in effect, officers of the company, and of course as your Honors know, in most industries, it is true that
6172 your patent men are probably better advised, and they work in close conjunction with the company concerning patent matters, and they really are the company on the business aspects of the matters that they handle.

So it seems to me that is not within the attorney-client privilege either.

But we make the second point on that, which we think should be controlling, and that is that if we can have Exhibit No. 233 introduced as being an exhibit which has been taken out from under the attorney-client privilege, in other words, if we have made a prima facie showing, as your Honors have held, that the privilege was waived as respects Government's Exhibit No. 233, it seems to me necessarily that the conversations leading to the writing of Exhibit 233 would be waived likewise.

You cannot simply waive a document and then say that the conversations or matters having to do with the writing of the document are not likewise waived.

That is not a case of lifting ourselves by our bootstraps in any sense, it seems to me. It is simply a case of carrying a waiver to the logical extent to which I think it goes.

So that on either ground—I think the first two conversations are clearly not within the attorney-client privilege, and I think the third conversation, much of it, and we contend none of it, is within the attorney-client
6173 privilege—but moreover, even though your Honors were to hold that it was, we would say that that likewise had been waived by the prima facie waiver which we have established in connection with Exhibit 233.

This is, as I understand it, merely a matter of connecting it with Certain-teed and the acts and purposes of Certain-teed.

Justice Stephens: Do you wish to reply, Mr. Adams?

Mr. Adams: I don't think there is any substance or anything in this record at all that indicates or justifies

Mr. Steffen's suggestion that the patent counsel here, or the other counsel, were acting in a business capacity. They were not; it is clear that they couldn't be. They were acting here, even on his theory that they wanted to get a device to avoid the other patents in the field, they must have been acting for the purpose of examining the legality of the position of their client, and they would have to give advice on that subject, because that would be the keynote of avoiding any such situation, of avoiding the other patents, I meant to say.

So that you can't say that that is a business matter, because it is precisely the contrary, and it has to be precisely the contrary.

Secondly, of course I don't think there is any substance to the suggestion of counsel that where a man waives a privilege on a document to be presented to a grand jury, that he has waived all the conversations with respect
6174 to the whole matter, and other matters between him and his client. It seems to me that that is, as your Honor suggested, clearly pulling yourself up by your bootstraps.

(The Judges conferred among themselves.)

Justice Stephens: We would like to know more about why these conversations were held. If this witness was there as an engineer of the company, or for the purpose, as an engineer of the company, of getting legal advice, if that was in substance and effect the reason he talked to these lawyers, we would like to know it. If, on the contrary, he was simply pushing his product, so to speak, we would like to know that. We are now engaged in a form of voir dire. The Government is trying to prove the connection of Exhibit 233 by certain conversations. Now an objection has been raised as to whether or not we can consider those conversations. Those are on voir dire. I should think that you might cross-examine Mr. Adams, or you might pursue the matter further, if you wish, Mr. Steffen, at this stage, to bring out a little more clearly what the conversations were for, what these conferences between Mr. Speer and these various persons were for. I don't require you to do that, but we feel considerably in the dark yet because I don't think the examination has yet clearly brought out why this gentleman was consulting these lawyers.

It seems to me, speaking for myself alone, that
6175 he was simply trying to get the company, and any officers that he could find to talk about it, to adopt this product.

Mr. Adams: Might we have an opportunity to consider that, your Honor?

Justice Stephens: Yes, we will take the noon recess at this time.

(Whereupon a recess was taken at 12:15 o'clock p.m. until 1:45 o'clock p.m.)

6176 AFTERNOON SESSION

(The trial was resumed at 1:45 o'clock p. m., pursuant to recess.)

Justice Stephens: Have you something more to say, Mr. Adams?

The Court had better make a brief statement before either counsel says anything. We have reached, I think, some conclusions on the pathway toward a decision on this waiver question which, if we state them, will help counsel, perhaps.

It should be borne in mind that our previous ruling as to Exhibit 233 was that a "prima facie showing on voir dire has been made of a waiver of privilege in respect of the proposed Exhibit 233." I emphasize the words "voir dire" to call the attention of counsel to the fact that we are simply engaged thus far in a preliminary inquiry as to a preliminary question of fact, bearing upon the admissibility of Exhibit 233, to-wit, concretely, whether or not the alleged Redfield-Dowd conversation did take place and contained the words which Redfield testified it contained. That is the primary undertaking which we are now carrying on.

Now we continued with our ruling to say—or to repeat it in summary, "the Court rules that a prima facie showing on voir dire has been made of a waiver of privilege in respect of proposed Exhibit U. S. 233, so that in the absence of convincing contradictory evidence as to the
6177 fact or content of the asserted Redfield-Dowd telephone conversation, the exhibit would be admissible subject to a showing, first, that it is an admission by Certain-teed; and, second, subject to the usual reservation, that is, a showing that it was in furtherance or execution of the conspiracy."

Now at the moment—I mean today—we are going into that topic just mentioned, that is, the question whether or not this Redfield document, which on its face is merely a

letter written by Redfield to Certain-teed, can be taken to be the act of Certain-teed as an admission, and that is all we are going into at the present time. We haven't yet ruled on the question whether this exhibit is admissible, even if it was the act of Certain-teed, because we haven't yet heard Dowd, since the Government objected to hearing Dowd yesterday. We are only engaged now in the question whether or not, by Mr. Speer's testimony, it can be shown that the Redfield exhibit, if it should later be held to have been waived so far as privilege is concerned, is Certain-teed's act or admission.

Now that being true, Mr. Steffen, it seems to us there isn't anything to your contention that what you refer to as a prima facie showing of waiver would include a waiver of these conversations we are talking about this morning, because you would only be in a position to make that contention if we had already heard Dowd and had de-
6178 cided that the Dowd-Redfield conversation was what Redfield testified to, and had then ruled that the exhibit was admissible in evidence, the preliminary question of fact having been determined in the Government's favor. Then you might be in a position to make the contention that the exhibit having been ruled as admissible, subject to connection with Certain-teed,—that is, admissible so far as the waiver question is concerned,—carried with it a waiver of the preliminary conversations which we are now dealing with. But even if that were true, we don't think there is anything to the contention that, if there is an established waiver so far as Exhibit 233 is concerned, that would carry with it a waiver of all conversations preceding the execution of Exhibit 233, which in any way related to it. It might carry with it a waiver of the very conversation in which Exhibit 233 was asked for or prepared or discussed. That might be said to be merged in the instrument. But we don't think it would carry with it a waiver of preliminary conversations.

Therefore, we are of the view that we have got to determine independently whether these conversations that have been testified to this morning are privileged or not privileged. But we feel—and we say this to both the Government and the defendants—that we haven't yet been shown the real nature of these conferences. If Mr. Speer,
6179 as an engineer of the company, of Certain-teed, was authorized to consult these lawyers concerning legal matters relating to the Speer device, or the Speer prod-

uct, and was acting, therefore, for Certain-teed in getting legal advice, the conversations may well be privileged. If, on the other hand, he had some personal interest in pushing his own product, and was simply trying to get the company to adopt it, and was therefore calling it to the attention of these lawyers and officers, if he had some special interest by way of bonus or commission, or something of that sort, which made it a personal matter, or even if, just as an engineer, he was merely personally interested in the success of his work as an engineer for the company, and tried therefore to call the product to the attention of the lawyers and other officers, but was not acting for Certain-teed in consulting them and getting legal advice, it would seem to us that these conversations might well not be privileged.

It seems to us that neither the Government nor the defendants have really yet gone beyond the fringe of these conversations, and that we ought to have some questions asked here as to why he was consulting these people, and who authorized him to consult them, if anyone, and what he was consulting them for, and in what capacity he was consulting them.

We want to know the real facts as to the nature
6180 of these conferences and the reasons for them.

Mr. Steffen: There is a motion to strike certain of the testimony before the Court, I believe. I would like—

Justice Stephens: (Interposing) We haven't passed on that yet, and we are not going to pass on it until we get further light on the nature of these conferences between Speer and these lawyers, if counsel are willing to go into that subject.

Mr. Steffen: I will ask Mr. Speer to take the stand.

Mr. Adams: How will this examination be conducted, Your Honor? I think that the Government having made its showing, perhaps I should apply for permission to examine him on voir dire.

Justice Stephens: Well, if Mr. Steffen has anything more, let him finish it, and then you can cross-examine.

Take the witness stand, Mr. Speer.

Thereupon, ALEXANDER S. SPEER the witness on the stand at the time of recess, resumed his testimony as follows:

Justice Stephens: We may also have to take a few moments to have Mr. Grover read us some of these conversations. We tried to do that during the noon hour, but were not able to get in touch with him.

Direct Examination (resumed)

6181 By Mr. Steffen:

Q. When you first came with Certain-teed, Mr. Speer, who did you talk with, with whom did you make your arrangements when you first came with Certain-teed? A. With Mr. Whittemore and Mr. Chaffee.

Q. Did you ever talk with Mr. George M. Brown? A. I don't think I had any talk with him about the contract.

Q. Can you tell us what the discussion was with regard to what your duties were to be? A. Well, I don't think there was any discussion at all, because I had a previous contract.

Q. Well, let's go into that in more detail. What did you do when you were working for Certain-teed? A. Well, I was getting up new processes and new articles.

Q. And how many, or what number did you get up, can you tell us that? A. Previous to Certain-teed coming in?

Q. No, I want to start with Certain-teed. A. Start with Certain-teed?

Q. That is right. A. Probably 15.

Q. And did those result, or some of those result,

6182 in patents? A. Yes.

Q. And did you ever make any reports to Mr. Whittemore or to anyone else concerning your work, from time to time? A. I did.

Q. And how were they made? A. I didn't understand your question.

Q. How were your reports made, and how often were they made? A. They were made verbally, as well as in writing.

Q. And when they were made verbally, where were they made? A. In New York.

Q. And to whom? A. And also in Buffalo.

Q. And to whom did you talk in New York? A. I talked to Mr. Whittemore and Mr. Chaffee.

Q. And what was the nature of your reports?

Mr. Bromley: I object to that as incompetent because calling for a conclusion.

Mr. Steffen: The question is broad. I would like to ask him broadly as to what he told Mr. Whittemore concerning the work he had under way.

By Mr. Steffen:

Q. Can you give us any detail as to that?

6183 Justice Stephens: Just a minute, there is an objection here. We will have to rule on it. If you are dealing with written reports—

Mr. Steffen: (Interposing) We are talking about verbal reports, Your Honor.

Justice Stephens: He has already told us about them, hasn't he?

Mr. Steffen: I don't think he has in detail. I want to know the nature of the reports that he made to Mr. Whittemore in order to lead into whether they were strictly technical or whether they had to do with the business aspects.

Justice Stephens: He may answer. The objection is overruled.

By Mr. Steffen:

Q. Tell me the scope of the reports that you made verbally to Mr. Whittemore, and to Mr. Chaffee, on these occasions when you were in New York? A. They were purely technical.

Q. And had to do with the products that you were making? A. Yes, sir—not only the products I was making, but the products that somebody else was making. I was acting as an expert.

Q. And by "somebody else", who do you mean?

6184 A. Somebody else in the company. And also, I had several outside inventions submitted to me, and I passed them on.

Q. And they had to do also with some of your own inventions? A. Yes, they did.

Q. Now these inventions that you made, were they your property or did you transfer them to Certain-teed? A. I transferred them to Certain-teed.

Q. And can you tell us whether you had to advise with Mr. Chaffee or anyone concerning the patents or those inventions? A. I had to go either to Mr. Whittemore or Mr. Chaffee, or to both.

Q. With regard to your— A. (Interposing) Inventions.

Q. (Continuing)—to your inventions? A. Yes, sir.

Q. And you have told us of your conversations with Mr. Chaffee, in part. Can you give us any more detail as to your conversations with Mr. Chaffee concerning these inventions which you were getting patents upon?

Mr. Bromley: I object to that as repetitious. He has given us the conversations. Shouldn't the man be asked whether he went to see Chaffee as an employee of the
6185 company consulting legal counsel for legal advice?

Justice Stephens: That is what we are interested in, Mr. Steffen:

Mr. Steffen: I think that would be objectionable if I asked it in that way. It calls for a conclusion.

Mr. Bromley: I won't object.

Mr. Adams: I won't object.

Mr. Steffen: What I want to do is to find out what he did, from which you can conclude whether what he did was for the purposes of getting legal advice.

Justice Stephens: The Court gets the impression that neither Mr. Adams nor Mr. Steffen is quite willing to go into the essence of this question.

Mr. Adams: If I could ask that question that Mr. Bromley asked just now, I would ask it.

Justice Stephens: Perhaps I prejudged you, because you haven't had a chance.

The objection to the last question is sustained, because we have heard this witness testify as to all he can remember about these conversations. What we want to know is whether or not he was consulting these people for the purpose of getting legal advice from them. I don't think you will find any objection to those questions if you are willing to ask them, Mr. Steffen. Of course, we don't compel you to ask them. You must try your own case.

6186 Mr. Steffen: I would like to ask him in a little more detail.

By Mr. Steffen:

Q. Did you consult with Mr. Chaffee concerning the form of the patents that you were taking out on your own inventions? A. I didn't quite get you.

Q. Did you consult with Mr. Chaffee concerning the form of the patents that were being taken out?

Mr. Adams: I think that ought to be clarified as to what he means by the "form of the patents". If he means was he asking him, as a lawyer, about how to get a patent, that is one thing; but the form of a patent is an established thing.

Justice Stephens: I don't know quite what the question means. Why don't you ask him the direct question—of course, Mr. Steffen, I don't want to put you in the difficult position of bringing out matters that you fear may be

inimical to the interests of the Government. If you want to drop the examination, you are entitled to do so. But I would like to ask the witness a question, and perhaps this will save time.

Mr. Steffen: I would be willing to have Your Honor ask just what is in your mind.

Justice Stephens: Very well.

6187 Mr. Speer, when you went to consult Mr. Chaffee, or talk to Mr. Chaffee and Mr. Redfield, as you testified this morning, for what purpose did you go to see them?

The Witness: Well, I wanted to get their advice about the whole thing.

Justice Stephens: What kind of advice?

The Witness: I would say legal advice.

Justice Stephens: Did you ask them, in those conversations you have testified to this morning, for legal advice?

The Witness: Well, I don't know how to answer that question.

Justice Stephens: Well, did you ask them for their counsel or judgment on legal questions relating to your proposed patents?

The Witness: I did, I asked Mr. Redfield and also Mr. Chaffee about these patents.

Justice Jackson: What did you ask them?

The Witness: I asked Mr. Redfield what he could do about getting up these different claims for the patents.

Justice Jackson: About getting up the claims for the patents?

The Witness: Yes. He acted as patent attorney.

Justice Jackson: Naturally you would ask him that. What did you ask Chaffee?

The Witness: I asked Chaffee also—

6188 Justice Jackson: (Interposing) The same thing?

The Witness: Not exactly, because he wasn't a patent attorney.

Justice Stephens: Now what was your interest in asking him those questions? Were you proceeding in behalf of yourself, or of the company, in asking those questions?

The Witness: Both.

Justice Stephens: State what authority had been given you by anyone, in the way of words or writing, to consult these gentlemen about these patent questions?

The Witness: I had a contract with the company, and the contract provided that I was to submit these patents to the company, to the Beaver Products, and also to Cer-

tain-teed, who purchased the Beaver Products, and that was my authority.

Justice Jackson: Under your contract, Mr. Speer, were you additionally compensated for your patents that were adopted by your employers?

The Witness: No, I was benefited by the royalty that they would collect, if they collected.

Justice Jackson: And when they collected royalty, you would participate in that royalty?

The Witness: One-fourth of the royalty, to be exact.

Justice Jackson: Then you had a personal interest in having your own patents adopted?

6189 The Witness: Yes, Your Honor.

Justice Stephens: Do you want to ask any questions, Judge Garrett?

Justice Garrett: You say any royalties that they might collect, you would have a participation in. I suppose that meant, did it, that if they licensed anyone under the patent and obtained royalties, then you would get a fourth of the royalties?

The Witness: One-fourth of it over and above a guarantee that I had. There was a certain guarantee attached to it.

Justice Garrett: In the event they used the patent alone, and did not license anyone under it, were you to receive anything for its use by them?

The Witness: No, I was not. They had to license outsiders.

Justice Garrett: And when you referred this morning to the matter of consulting with reference to how royalties could be collected, you had reference to those royalties that might result from any licensing of the patents?

The Witness: That is correct, Your Honor.

Justice Garrett: That is all.

Mr. Bromley: I would like to ask this: When you said you had a guarantee under your contract, you meant that you had a salary of some $15,000 or $20,000 a year under the contract, didn't you?

6190 The Witness: I had a part salary and part royalty guarantee. I didn't have to put all my time into my work, I could do something else on the outside.

Mr. Bromley: But you had a salary?

The Witness: It was a guaranteed royalty.

Mr. Bromley: That was a flat sum per year, wasn't it?

The Witness: Yes, it was a flat sum.

Mr. Bromley: And then if the company licensed somebody else under patents which belonged to the company but which covered your inventions, you got over and above that a share in whatever royalties the company collected?

The Witness: I would like to just elaborate so as to make it clear. I was to receive a certain amount of guarantee—it happened to be $15,000. Now all the royalties they collected from the outsiders, outside firms, they figured out the total amount, and they deducted the guarantee. It actually worked, in many cases.

Justice Stephens: Have you got a copy of this contract under which you were working for the company, with you?

The Witness: Yes, Your Honor.

Justice Stephens: Have you it here?

The Witness: Yes, I have it here.

Justice Stephens: I still think that we perhaps haven't yet quite got down to the question whether or not, when this witness was talking with these two lawyers,
6191 Chaffee and Redfield, he was, within the scope and course of his duties, consulting them for the company.

Mr. Steffen perhaps might, on the part of the Government, object to the Presiding Judge's questions on that topic as to their conclusional character.

I would like to see this contract. If he had some instructions from the company to consult lawyers, that is one thing. If he was going there to consult these lawyers because of his own interest in royalties, that is another thing.

By Mr. Steffen:

Q. Did Mr. Redfield or Mr. Chaffee consult with you on occasion? A. They did.

Q. And did they on many occasions? A. I would say yes.

Mr. Steffen: I have here, Your Honor, a contract, which is dated, however, in 1930—and the only reason I haven't introduced it is that it is dated in 1930. It purports to cover and be similar to all prior contracts. There have been a number of contracts between the company and Mr. Speer.

Justice Stephens: It is subsequent to these conversations, isn't it?

Mr. Steffen: This is subsequent, and that is the
6192 reason I haven't used it. I don't have any of the original, earlier contracts.

Justice Stephens: Perhaps if we let Mr. Adams conduct some examination—

Mr. Steffen: (Interposing) Maybe Mr. Adams has some earlier contracts.

Mr. Adams: I don't have these earlier contracts—

Justice Stephens: (Interposing) I want to be sure Mr. Steffen is through.

Mr. Steffen: I think I am, for the moment.

Mr. Adams: I do not have these earlier contracts, but if I might look at this one, I might be able to—

Justice Stephens: (Interposing) You may, there will be no objection to that.

(The contract referred to was handed to Mr. Adams.)

Justice Stephens: If you can bring out from the witness that this is in substance the same as the previous contracts and nobody objects to the use of secondary material, you can find out from that, maybe, what this man had authority to do. It seems to us that if this man was consulting these lawyers in his own private capacity that is one thing; but if he was going there to consult them as an engineer for the company, about patent law, that is another thing.

Mr. Steffen: He has told us that he has a one-
6193 quarter interest and the company has a three-quarters interest in every invention that he made while he was employed by the company; they were all assigned over to the company; they might be used one way or the other; and he was consulted by Redfield and Chaffee just as much as he consulted them. He was also consulted by Whittemore, and he consulted Whittemore; and he was also consulted by Van Hagan and he consulted Van Hagan.

Mr. Bromley: Would it help to find out whether this man paid the lawyers?

What is the fact, Mr. Speer?

The Witness: The fact is that the company paid the lawyers. According to my contract, I wasn't to pay any legal fees.

By Mr. Adams:

Q. Mr. Speer, I have here a document which purports to be an agreement, dated June 4, 1930, between you and Certain-teed. That is the one that you produced and gave to Mr. Steffen, isn't it, that we are talking about? A. Yes.

Q. And this agreement is really substantially a continuation of your earlier agreement with Beaver, isn't it? A. That is correct.

Q. And does it contain substantially all of the provi-

sions that the contract you had with Beaver con-
6194 tained? A. Yes, sir.

Q. So that what you did, when you came with the Certain-teed Company, was to cancel your Beaver contract and take a new contract? A. Yes.

Q. Which, so far as you were concerned, put you in the same place with Certain-teed that you had been with Beaver? A. No, it didn't, I received less money. (Laughter).

Q. But so far as what you had to do, it was the same thing, is that right? A. Exactly the same.

Q. Your obligations under the contract were the same? A. Yes, sir.

Q. And so far as you recall, the provisions in the Certain-teed contract were substantially the same as the ones in the Beaver contract? A. Yes, sir.

Mr. Adams: Under those circumstances, Your Honor, I offer this document in evidence, however with the condition attached to my offer that I should not like to have it deemed to be a defendants' exhibit, but merely offered on the voir dire.

Justice Stephens: This is only on voir dire. We are
6195 now on a subordinate voir dire, so to speak. We are now on a voir dire as to the admissibility of these conversations between this witness and Redfield and Chaffee, and are pursuing the question of the admissibility of those conversations in order to determine whether or not this Exhibit 233, if privilege has been waived in respect of it, can be connected with Certain-teed. We are merely on voir dire now, on the right to have these conversations come in evidence.

Mr. Adams: I have no doubt. I am merely being overcautious, but I simply wanted to make that offer.

Mr. Steffen: I will be glad to introduce this contract.

Justice Jackson: Is that the original?

Mr. Steffen: Yes.

Justice Jackson: Probably Mr. Speer would want to go home with that in his pocket, so why not have copies made of it?

Justice Stephens: We can have copies made, and then the original withdrawn. Let it be marked and introduced as an exhibit, with the understanding that the original may be withdrawn and a copy substituted.

Mr. Steffen: There is no question, I take it—it is signed by Mr. Speer and Mr. Whittemore.

Mr. Adams: There is no question about it.

By Mr. Steffen:

Q. I show you what has been marked Govern-
6196 ment's Exhibit 644 for Identification, and ask you if that is your contract?

(The document referred to was marked as Government's Exhibit No. 644 for Identification.)

A. Yes.

Q. Is that your signature at the foot of it? A. Yes, it is.

Q. And the other signature is whose? A. Mr. Whittemore's.

Mr. Steffen: We offer Government's Exhibit No. 644 in evidence.

Justice Stephens: It will be received.

(The document referred to, marked as Government's Exhibit No. 644, was received in evidence.)

Mr. Adams: Would Your Honors care to examine it?

Justice Stephens: You may examine upon it or examine it yourself.

Mr. Adams: Would you like to look at it, that was my question?

Justice Stephens: We would like to have those portions pointed out which have any bearing upon this man's duty to consult lawyers for the company, or not.

Mr. Bromley: I think paragraph 5 is the important one.

6197 Mr. Adams: I simply call attention to Paragraph 5, and thought perhaps the Court would like to look at it.

(Government's Exhibit No. 644 handed to the Court for examination.)

Justice Stephens: Proceed, Mr. Adams, if you wish to ask this witness some questions.

(Government's Exhibit No. 644 handed to the witness.)

By Mr. Adams:

Q. Mr. Speer, will you look at the fifth paragraph of Government's Exhibit 644? A. Yes, sir.

Q. Now it is the fact, isn't it, Mr. Speer, that when you had anything relating to an invention, under that agreement— A. (Interposing) Applying to building, I